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DATE ISSUED: AUGUST 3, 2000

CASE NO.: 1999-LHC-2911

OWCP NO.: 07-139596

IN THE MATTER OF

BRIAN WORTHY,
Claimant

v.

GATX TERMINAL CORP.,
Employer

and

CIGNA INSURANCE COMPANY,
Carrier

APPEARANCES:

Lloyd N. Frischhertz, Jr. Esq.
On behalf of the Claimant

Maurice E. Bostick, Esq.
On behalf of the Employer and Carrier

Before: Clement J. Kennington
Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Brian Worthy (Claimant), against GATX Terminal Corp., (Employer) and Cigna Insurance Company, (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on April 27, 2000, and May 4, 2000, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post hearing briefs in support of their positions. Claimant testified and introduced forty-one exhibits, which were admitted into evidence, (CX-1 to CX-41), including photographs of the Employer dock terminal and plant; LS-203 Claim Form; OWCP recommendation and memo of informal conference; Claimant's statements; Employer disability claims; Navy Reserve promotion letter; Employer accident investigation report; September 18, 1996 letter from OWCP to Attorney Rebecca Cooper; Claimant's Notice of Claim and Statements of Claim; a diagram of the Employer plant; Boiler firemen job classification and description complaint or grievance report; February 6, 1995 memo from Claimant on boiler/softener training; Coast Guard Hazardous Materials Certificate of Registration; Employer Maintenance Work Order List; Claimant's training program; 1993 and 1995 wage records; LS-202; LS-207; LS-206; LS-208; ALJ Decision and Order on jurisdiction; Employer letter suspending short-term and long-term disability; Compensation payment records of CIGNA; Dr. Miranne's records and deposition; Thomas Meunier's, Vocational Rehabilitation Specialist, report and deposition; Employer records of compensation payments; Affidavit terminating J. Masters; Dr. Applebaum's deposition and records; 1995 tax return; Partnership Agreement J. Masters; Department of Navy disability letter; Viagra medication receipt; Cervical MRI; Metropolitan Life Credit Life Protection; Claimant's LTD claim with CIGNA; and 1993-94 J. Masters' IRS Form 1065.

Employer introduced twenty-four exhibits, (EX-1 to 5, EX-7 to 22, EX-24 to 26)which were admitted into evidence, including Department of Labor Forms filed; Vocational Rehabilitation reports and labor market surveys; surveillance videotapes; benefits payment history; social security records; Claimant's answers to written discovery; application for special fund relief; functional capacity evaluation (FCE); Secretary of State Records of J. Masters, Inc.; Randy Sheyte's deposition; Dr. Robert Applebaum's deposition and records; Dr. Thomas Jeffcoat's deposition; Rehability Center records; documentation of short and long term disability payments; Claimant's 52 week pre-accident earnings; June 24, 1994 memo concerning Claimant's absences and an absentee calender documenting such; Dr. Robert Steiner's records; Dr. Sketchler's records; Brown/McHardy Clinic records; East Jefferson Hospital records; Dr. Hugh Fleming's records; documentation of February 1996 auto accident; and a Employer preliminarily incident report.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witnesses' demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

## I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The date of Claimant's accident was July 13, 1995.

2. An Employer /Employee relationship existed at the time of the accident.

3. Claimant filed an LS-203, Claim for Compensation, on June 5, 1996. (EX-2, p. 27).

4. Employer filed an LS-202, First Report of Injury, on August 28, 1996 and again on October 18, 1996. (EX-2, pp. 30, 38).

5. Employer filed initial Notices of Controversion, LS-207, on August 6, 1996 and August 13, 1996, based on a lack of jurisdiction, and additional Notice of Controversions on the following dates: (1) September 3, 1996, supplementing the August 13, 1996 LS-207; (2) April 10, 1997, again addressing the issue of jurisdiction; and, (3) and October 28, 1998, addressing the issues presently before me. (EX-2, pp. 1, 20-21, 29, 34-35, 40).

6. An informal conference was held on the matter of jurisdiction on February 25, 1997, and a second informal conference was held on March 4, 1999, addressing the issues presently before me. (EX-2, pp. 14, 36-37).

7. Claimant filed an LS-18, addressing the issue of jurisdiction, on May 9, 1997, and a second LS-18 was filed on July 16, 1999, addressing the issues presently before me. (EX-2, pp. 18, 42).

8. Employer filed an LS-206, Payment of Compensation Without Award, on January 26, 1998, indicating voluntary payment of a weekly compensation rate of $574.88. (EX-2, p. 7).

9. Employer paid Claimant $78,486.05 in short and long term disability payments, as well as $29,678.48 in longshore compensation payments, totaling $108,164.53 paid to Claimant since his workplace accident and through April 16, 2000.

10. Employer paid Claimant $28,500.96 in medicals, which constituted all of the medicals relative to Claimant's back problems.

## II. ISSUES

The following unresolved issues were presented by the parties:

1. Whether Claimant suffered an injury in his July 13, 1995 workplace accident.

2. Timely Notice of Injury[1].

3. Nature and Extent of Claimant's Disability.

4. Date of Maximum Medical Improvement (MMI).

5. Reasonable and necessary medical expenses.

6. Pre-existing condition.

7. Average Weekly Wage (AWW), which was stipulated to be $858.82 if Claimant's Naval Reserve pay was excluded, or $995.38 if Claimant's Naval Reserve pay was included.

8. Suitable Alternative Employment (SAE).

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[1]. I will summarily address this issue presented by the parties, as said issue is a non-issue under Section 12(a) of the Act, which provides that notice of an injury for which compensation is payable must be given within thirty days after the injury, or within thirty days after the employee or beneficiary is aware of, or should have been aware of, a relationship between the injury and employment. It is Claimant's burden to establish timely notice. As Claimant argued that he reported the injury on July 13, 1995 to Employer, and Employer argued that a report was not made until July 17, 1995, both dates clearly meet the timely notice requirement of the Act. Furthermore, Employer acknowledged in their October 18, 1996 LS-202 that the accident occurred on July 13, 1995, and that they first gained knowledge of the accident on the same date through eyewitnesses. (CX-18; EX-2, pp. 29-30, 38).

9. Section 8(f) relief.

10. Timely Controversion.

11. Attorney's Fees.

## III. STATEMENT OF THE CASE

### A. Chronology:

Brian Worthy (Claimant), is a forty year old male, married to Angela Worthy, with three dependant children. (Ex-1; Tr. 109-17, 232-33). Claimant has lived with his family for the past two years in Ridgeland, Mississippi, where his wife works while owing a house in New Orleans occupied by his sister. Claimant graduated from Messick High School in 1978. He earned his Bachelor' of Arts degree in Political Science at Tougaloo College in Jackson, Mississippi in 1982. From 1983 through 1987 Claimant served on active duty with the U.S. Navy after which he was honorably discharged. Claimant continued service in the Naval Reserves until 1996, when the Navy released him due to disabling back and neck injuries which are the subject of the instant dispute. As a Naval officer Claimant taught classes in naval science and first aid, and was responsible for weapons training. He completed more than half of his service time towards retirement when released in 1996. (Tr. 233-38).

Claimant's first civilian job was at Texas Instruments, from 1987 to 1990, as a maintenance and floor supervisor. He worked in the plant and was responsible for the technicians of high-tech equipment, which equipment pumped chemicals. His job was physical and involved repetitive climbing of large holding tanks. At times, he would even have to do the physical work of the men he supervised. Claimant left this job for an increased salary. In 1990, Claimant went to Employer as a maintenance supervisor. In addition, Claimant attended Troy State University and in 1993 received his Master of Science degree in Management.

At Employer, Claimant was a hands-on supervisor of thirteen individuals, including mechanics, electricians, welders and utility laborers. He was responsible for the maintenance and operations of the entire plant. If something broke down, it was Claimant's responsibility to identify the problem and to make sure that it was fixed. His work area was spread out over about fifteen football fields and involved a great deal of walking, climbing bending, stooping with some lifting and upper body physical exertion. (Tr. 238-

43).

Claimant was thirty-five years old when he got hurt on July 13, 1995. He had prior back problems and was treated primarily by Dr. Sketchler at the Browne-McHardy Clinic (Browne), his regular doctor under the group health plan. (Tr. 118-19). While at Employer, Claimant remained in the Naval Reserve serving several weekends a month. Often he would go as far as California or Virginia on a Friday and not get home until Monday. In addition, each year he served on active duty putting in not only the required two week stint, but an additional two weeks using vacation time or time he had saved up at Employer. (Tr. 120-21).

If Claimant developed a medical problem while working for Employer, and particularly if he developed a back problem, he would go to Browne. Claimant was an athlete through school and continued to be very athletically active until his 1995 workplace injury. Following athletic events, it was not uncommon for him to have his back or shoulder or knee pain. In July 1991, Claimant was treated for minor back complaints related to a 1989 skiing accident. In July 1992, Claimant was seen again at Browne for a work related back injury with Employer which he sustained while climbing over tanks. (Tr. 122-24). Claimant did not lose time and did not collect workers compensation benefits from Employer for this injury.

On November 16, 1992, Claimant went to Browne indicating that he had difficulty with his back lifting a child, which he related to his July 1992 work related incident. Thereafter in February, 1994, Claimant, while at work lifting an object injured his low back and left leg. Dr. Sketchler treated him several times in February, and again in June 1994, at which time Claimant reported improved symptoms. On June 15, 1994, an MRI was performed at East Jefferson General Hospital, which showed narrowing and dessication of the L4-5 and L5-S I disc with only slight to mild bulging of the L5-S I disc and some degenerative disc disease with no significant bulging or herniation. (EX-20, p. 45). Claimant denied any other difficulty with his back or legs and was not seen again for any back complaints until his July 13, 1995 workplace accident. (EX-12, p. 52; EX-20, p. 33; Tr. 125-28).

On July 13, 1995, a Thursday, Claimant was working for Employer as a maintenance supervisor. (Tr. 129-35; EX-7). He and another employee were checking a tank with a new pump, when a pipe ruptured and oil began spraying into the air. Claimant and the foreman, Ed Browner, proceeded to shut off the valve by hand, which was a strenuous task that was usually accomplished with a motor or roll torque, when Claimant popped his back out of place. The accident was witnessed by another foreman, Terry Roussel, and another mechanic. Claimant testified that he verbally informed Ricky Rykosky, the safety manager engineer, about the accident the day it happened, and continued working. Nonetheless, Claimant left work earlier than usual the day of his workplace accident due to pain. Claimant stayed home the following day, Friday, July 14, 1995, due to severe stiffness and pain, stayed in bed the whole weekend, and returned to work the following Monday, July 17, 1995, when he completed an accident

report.[2]

Dr. Sketchler first examined Claimant on July 27 1995, finding that Claimant had persistent discomfort in his low back, with the left side intermittently more moderate than at other times with intermittent tingling in the left lower extremity. Claimant presented to Dr. Sketchler that he injured his back while attempting to turn a valve in the July 13, 1995 workplace accident. (Tr. 127). Dr. Sketchler found Claimant's reflexes to be diminished throughout, but symmetrical, and diagnosed Claimant with lumbar strain, as well as aggravation of lumbar disc disease. Dr. Sketchler next saw Claimant on August 17, 1995 due to continued pain. Dr. Sketchler's impression was that Claimant suffered from degenerative disc disease, with his findings about Claimant's overall physical condition remaining consistent with prior findings. Dr. Sketchler prescribed Vicodin and Naprosyn for pain, and recommended physical therapy. (EX-19, pp. 1-3).

On August 25, 1995 Dr. Sketchler phoned Tony, with Employer's office, informing him that Claimant was unable to work at that time due to his back condition and that Claimant should undergo physical therapy, as recommended by Dr. Sketchler on August 17, 1995. On August 30, 1995 Carrier approved therapy, which Claimant received from August 31, 1995 to October 26, 1995 at Health South. (EX-20, pp. 90-91). Claimant continued to see Dr. Sketchler as needed., who referred Claimant for a surgical consult with Dr. Miranne in October 1995. (Tr. 135-37; EX-19).

Dr. Sketchler treated Claimant again on October 5, 1995, finding that Claimant had intermittently attended physical therapy, due to a death in the family, and continued to suffer from symptomatic lumbar disc disease. Dr. Sketchler noted that Dr. Steiner had seen Claimant in the interim, and an MRI of the lumbar spine was performed on September 25, 1995, indicating a moderate disc protrusion at the L5-S1, type IIb mainly toward the left, which was consistent with a prior MRI of Claimant's lumbar spine, completed on June 15, 1994, with the September 25, 1995 MRI indicating a slightly increased bulge. (EX-

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[2]. Claimant testified that he did not work the entire day of July 17, 1995. Dr. Sketchler's records indicate that Claimant worked following his workplace accident until July 27, 1995, when Claimant first visited Dr. Sketchler. (EX-19, p. 1). Conversely, Claimant testified that he was out of work from July 17, 1995 until September 1995, when he returned to work for about a week, that he has not worked since that time in September 1995. (Tr. 134-35). I find that I am able to make a well founded decision concerning Claimant's entitlements to benefits under the Act based on the evidence in the record and testimony, regardless of whether Claimant worked until July 17, 1995 or July 27, 1995. Additionally, records indicate that Claimant returned to work for one week, beginning October 9, 1995, not in September 1995. Neither party submitted any further information about the nature of the work Claimant performed during this week and whether it complied with Dr. Sketchler's restrictions of light duty in an office type setting. (EX-20, p. 31). Thus, I find that Claimant, in fact, returned to work for one week in October of 1995, which fact is irrelevant in determining benefits due under the Act, considering subsequent medical findings of necessary back surgery and disability.

19, p. 5). Dr. Sketchler continued the Naprosyn and Vicodin, recommending a referral to a neurosurgeon, possibly Dr. Miranne.

Dr. Robert Steiner saw Claimant on August 25, 1995, per Employer's request, with complaints of low back pain and left lower extremity discomfort. Claimant exhibited no evidence of neurological deficit, however, there were findings suggestive of mild lumbosacral nerve root irritation on the left. Dr. Steiner recommended that Claimant undergo a lumbar MRI scan, as Claimant had not improved after two months of conservative treatment. (EX-18; Tr. 136).

As mentioned above, Diagnostic Imaging Services (DIS) completed a lumbar MRI scan on September 25, 1995, which indicated a degenerative disc bulge at L4-5, with left-sided disc herniation at L5-S1. Dr. Steiner deemed the diagnostic findings to be consistent with Claimant's complaints and the physical findings, and diagnosed Claimant with lumbar disc disease. (EX-18). Dr. Steiner recommended a lumbar McKenzie program, noting that Claimant was capable of working only in a sedentary capacity.

Claimant was next seen by Dr. Miranne on a referral from Dr. Sketchler on November 1, 1995. Claimant related a history of low back and left radicular leg pain, numbness, tingling and weakness. His condition was reported as getting worse, despite conservative treatment, physical therapy, medication and reduced activity. Dr. Miranne found not only sensory loss, but also neurological motor deficits and an absent left ankle reflex. He reviewed the lumbar MRI scan, and like Dr. Steiner, diagnosed degenerative disc and bulging at L4-5 but specifically diagnosed a disc herniation at L5-S I on the left. Claimant had lumbar radiculopathy secondary to the ruptured disc. Dr. Miranne opined that conservative management had been exhausted, and recommended surgery, which Claimant accepted. (CX-25, pp. 46-48).

Carrier informed Dr. Miranne they would not approve surgery on November 15, 1995 and required a third opinion, despite Dr. Steiner's confirmation of a herniated lumbar disc with the possibility of surgical intervention being needed. On January 22, 1996, about three months after Dr. Miranne recommended surgery, Claimant was examined by Dr. Robert L. Applebaum, a neurologist, who recommended a lumbar myelogram and CT scan to determine whether cervical intervention was absolutely necessary. Claimant reported continual pain in his neck, extremities, and low back, with the pain being more severe in the low back and extremities, than in his neck. Upon Claimant's initial visit on January 22, 1996, Dr. Applebaum reviewed with Claimant his medical treatment history and the details of Claimant's workplace accident. The examination, upon that January 22, 1996 visit to Dr. Applebaum, showed minimal mechanical and neurological findings present in the lumbar region and no significant findings in the cervical area. The lumbar and cervical myelogram and CT scans were performed March 21, 1996 at DIS. Dr. Applebaum interpreted the cervical myelogram to show minimal bulging present at the C5-6 level, which appeared to be of no clinical significance. The CAT scan of the cervical region following myelography showed no evidence of a herniated disc or other significant abnormality. The lumbar myelogram was reviewed and showed some minimal bulging at the L4-5 level and a widened AMI at the L5-S1 level. Dr. Applebaum saw no lesions in the nerve roots on the myelogram. The CAT scan of the

lumbar region following myelography showed some herniation of material at the L5-S1 disc space centrally and slightly paracentrally to the left.

Dr. Applebaum reported to Carrier on March 22, 1996 and noted bulging at C5-6 and bulging at L4-5. He noted a disc herniation at L5-S1 and recommended a lumbar laminectomy at L5-S I with removal of the disc. (EX-20, p. 75). Noteworthy is the fact, that On February 17, 1996, about one month after his initial visit with Dr. Applebaum, Claimant was involved in a motor vehicle accident, which he reported to Dr. Applebaum upon his next examination. (EX-12; Tr. 139-41).

On April 6, 1996, Dr. Miranne examined Claimant, who reported that his symptornatology had worsened. Upon that visit, Dr. Miranne indicated he would review the films and report whether surgery was still recommended. Claimant again saw Dr. Miranne on April 19, 1996. Dr. Miranne had reviewed the films and again saw the ruptured lumbar disc at L5-Sl, centrally and to the left, causing S 1 nerve root compression. (CX-25, pp. 44-45). Surgery was scheduled and on May 9, 1996, Claimant underwent a lumbar hemilaminectomy L5-S 1, with foraminotomy on the left. (EX-21, p. 5; CX-38, pp. 19-21).

Claimant did not enjoy much relief from the surgery and on November 5, 1996, Dr. Miranne ordered a repeat lumbar MRI, which disclosed scar formation at the operative site, which appeared to encircle the proximal aspect of the left-sided S I nerve root. The MRI also showed an L5-S I right-sided bulge, a flattening of the posterior L4-5 disc, and dessication of L4-5 and L5-Sl. (EX-21, p. 2). The surgery was not successful and scar tissue encircled the left S 1 nerve root. Additionally, there was a symptomatic L4-5 disc. Dr. Miranne also ordered EMG nerve conduction studies which were performed by Dr. Fleming on December 17, 1996. The EMG study showed the chronic denervation in the L4-5 distribution on the left side, or chronic changes noted in the left L5 myotome consistent with old route injury or scar. (EX-22, pp. 2-4; CX-39).

Claimant continued under the care of Dr. Miranne, post operatively, on a monthly basis and continuing to the present, with essentially no change or improvement in his condition, Claimant's complaints have been consistent and have never improved, but for worsened symptomology with exercise and activity. (CX-27, p. 10-11). Claimant was noted to remain in chronic pain with positive neurological signs, motor weakness, reduced sensory changes, diminished and absent reflexes.
Claimant subsequently had a repeat myelogram and CAT scan done in February 1997 at the VA Hospital, following which Dr. Hersch performed surgery on Claimant's neck. Following neck surgery, Claimant began wearing a cervical collar, which afforded him some relief of his cervical symptoms.

Dr. Applebaum examined Claimant again on November 14, 1997, June 26, 1998, and most recently on February 23, 2000. Claimant was consistent in his presentation to Dr. Applebaum upon physical examination, reporting pain in his left leg running into his heel, numbness in his left foot, pain in his left buttock and low back, pain in his left leg, some numbness in his left hand, and pain in his left shoulder and arm. (EX-12, pp. 51-65; CX-38, p. 14). Dr. Applebaum examined Claimant's on November 14, 1997, and opined that Claimant had reached MMI, in regards to his back, by that time. (EX-12, pp. 57-

65). Dr. Applebaum examined Claimant again on June 26, 1998 and last examined Claimant on February 23, 2000, upon which visit Claimant was taking Neurontin 300 mg three times per day as well as Elavil, Robaxin, and occasional Advil. His examination in comparison to the most recent examination in June, 1998, showed slight improvement in his findings. Dr. Applebaum again opined that Claimant had reached MMI in regards to his back, and recommended no further neurosurgical, diagnostic or therapeutic procedures.

In short, Dr. Applebaum opined that Claimant's back problems were aggravated in part and exacerbated by his July 13, 1995 workplace accident. He thought there was evidence of pre-existing impairment and problems in Claimant's back, which pre-existed his July, 1995 workplace accident and which would have caused his current impairment to be greater than it would without his preexisting back condition. Dr. Applebaum did not think Claimant's neck problems were caused by said workplace accident, but rather his motor vehicle accident of 1997. Dr. Applebaum opined that most of Claimant's impairment was related to his back and less so to his neck. Although, Claimant would have about a 10-15% impairment of the body as a whole with approximately one-fourth of that being attributed to his neck. Generally, Dr. Applebaum restricted Claimant's activities to some form of light work, involving no prolonged bending, stooping, or lifting any loads greater than twenty to thirty pounds. (EX-12, p. 61).

Claimant has not returned to work as a longshoreman since October 1995, when he returned to work for about one week after being released to work light duty on October 5, 1995 by Dr. Sketchler, and has not worked for a salary for anyone else since that time. (Tr. 25-26, 193). Following his workplace accident, Claimant began receiving Social Security Disability (SSD) benefits in 1998. (Tr. 147).

Claimant met with vocational rehabilitation specialist, Nancy T. Favalora (Favalora), upon Employer's request, in November 1997, to determine job possibilities for Claimant. (Tr. 40). Favalora gathered personal background information on Claimant, as well as reviewing Claimant's work history, and medical treatment history related to his workplace injury. In addition, Favalora completed a vocational analysis of Claimant, which indicated that Claimant has acquired skills from past work that are transferable into a variety of employment settings. Claimant's past work require above average aptitudes in tasks dealing with verbal and numerical abilities. In addition, Claimant possesses a Masters degree in Management, which qualifies him to perform a variety of management jobs. (EX-1, pp. 1-4).

In short, Favalora opined that Claimant possesses two college degrees and has performed semi-skilled work in the past, thus he should be able to re-enter the labor market at that same level. As well, Claimant has demonstrated above average aptitude in general intelligence, which Favalora interpreted as indicating an ability to learn new job tasks. Favalora also indicated a need for a rehabilitation conference between herself and Dr. Miranne, to obtain Claimant's work restrictions and to determine the need for a rehabilitation conference. However, there was no evidence submitted to the record indicating that said conference was followed up on.

At the request of Favalora, Claimant underwent a functional capacity evaluation (FCE) on April 21, 1998, completed by Randy Shetye, P.T., (Shetye) at Orleans P.T. & Sports Rehab Center. Claimant passed only 6/22 validity criteria, indicating a submaximal effort; although, Claimant did not demonstrate any symptom exaggeration behavior. Claimant cannot bend, reach, climb, squat or kneel. He can alternate sitting, standing and walking throughout the workday. Claimant was unable to complete the FCE due to severe pain, thus the results of said FCE were invalid.

Taking into consideration the FCE and Drs. Applebaum and Miranne's restrictions placed on Claimant, Favalora completed a labor market survey in the Greater New Orleans area, identifying appropriate positions for Claimant, based on his vocational profile. In her October 29, 1998 report, Favalora identified seven full-time positions that she opined Claimant could perform using the skills and abilities he had acquired from past work. (EX-1, pp. 5-8). Favalora subsequently conducted an updated labor market survey in the New Orleans area and the Jackson, Mississippi area[3], the results of which were identified in an April 24, 2000 Vocational Rehabilitation Report. (EX-1, pp. 9-14). Additional file material was reviewed in preparation for this report, and Favalora identified numerous additional full-time positions that she opined Claimant could perform using the skills and abilities he had acquired from past work.

Claimant also met with vocational rehabilitation specialist, Thomas Meunier (Meunier), who interviewed and tested Claimant on March 10, 2000 for the purposes of vocational rehabilitation evaluation. Prior to that meeting, Meunier reviewed the medical, depositional, allied health, and Claimant's employment related records and information. (CX-28, p.1). Meunier opined that Claimant had options with respect to entry level manager trainee and other clerical/sales opportunities because he is a college graduate, with supervision experience, but middle management and other management opportunities requiring a masters in business administration would be difficult for Claimant to compete for since his degree was obtained 7 years ago and he does not have any management experience. His working supervisory experience would be beneficial to him and would allow him to qualify for a number of entry level manager trainee positions. These entry level manager trainee positions as well as customer service representative positions offer starting wages ranging from $19,000.00 to $25,000.00 per year. (CX-39, pp. 5-8, 11-14, 17-24, 34). Of noteworthy significance, Meunier expressed concern about Claimant's ability to maintain employment, after securing a position, due to chronic pain and the things that accompany chronic pain, as documented by Dr. Miranne, such as trouble with attendance. (Tr. 85-89).

Moreover, Carrier hired a third physician, Dr. Thomas Jeffcoat to review certain medical records, and who examined Claimant on one occasion, April 1, 1999. Dr. Jeffcoat, orthopaedic surgeon, was deposed on January 17, 2000, by Claimant's counsel, Lloyd N. Frischhertz, and Employer/Carrier's counsel, Maurice Bostick. Dr. Miranne is board certified by the Academy of Orthopaedic Surgeons. (EX-13). Dr. Jeffcoat recounted the basic details of Claimant's July 13, 1995 workplace injury and the subsequent medical treatment received in relation to said injury, as well as Claimant's prior history of

[3]. Claimant's wife is currently residing in that area.

medical problems and treatment. Although, Dr. Jeffcoat received numerous medical files relative to Claimant's medical treatment history, he admittedly did not give said reports much attention and based his opinion on a five minute review of the FCE report, a four page summary of Claimant's pre-accident medical records prepared by Employer/Carrier's counsel, and his one examination of Claimant on April 1, 1999. He could not even recall the nature of Claimant's back surgery, and simply recalled that he knew Claimant had an incision on his back. (EX-13, p. 25-26, 33-34, 59-63).

Dr. Jeffcoat testified that Claimant's then present back problems were just a continuation of problems that pre-existed his workplace injury, and he believed Claimant was exaggerating. (EX-13, pp. 14-18, 33-34). Dr. Jeffcoat did not believe Claimant's 1995 workplace injury made any difference in Claimant's back condition. In fact, he did not even think Claimant sustained a disabling injury in 1995. Nevertheless, Dr. Jeffcoat based his opinion on erroneous information, that Claimant did not claim injury until weeks after the accident, when in fact Claimant immediately reported the injury to Rykosky. Dr. Jeffcoat's testimony while certainly not dispositive, lacks credibility.

**B. Procedural History and Payments to Claimant**

Employer initially treated Claimant's workplace injury as a Louisiana Worker's Compensation claim. Employer allegedly paid Claimant his full salary from July 13, 1995 to August 31, 1995, and then benefits pursuant to a short term, and then long term disability policy because the benefits exceeded maximum compensation under the Louisiana Worker's Compensation laws, with all of said payments taxed as income. (EX-2, pp. 6, 16-17; EX-4). Claimant filed a claim under the Act and Employer controverted said claim, alleging coverage under the Louisiana compensation laws. A formal hearing was scheduled to determine jurisdiction and on February 2, 1998. (EX-2).

On January 30, 1998, Employer filed a document seeking to dismiss the claim pending before me, certifying that Employer and Claimant had agreed to amicably resolve the matter and that Employer would commence paying compensation pursuant to the Act. The document certified that the only disputed issue at the time was coverage and that compensation under the Act would be paid. Full compensation benefits under the Act were not started, but Employer did terminate long-term disability payments which were paying Claimant 50% of his salary. On January 29, 1998, Employer notified Claimant that Carrier would begin paying workers compensation benefits under the Act and they were suspending Employer disability income payments pending receipt of reports from both Carrier and the Social Security Administration concerning benefit entitlements. The benefits were suspended as of January 31, 1998. (CX-23).

On February 5, 1998, I granted Employer's February 2, 1998, Motion to Withdraw Claim as they stipulated to jurisdiction, and issued a Decision and Order accordingly. (EX-2, p. 3). Employer submitted misleading LS-208's, as well as a misleading LS-206 on January 26, 1998, suggesting that they were voluntarily paying Claimant $574.84 a week, or two thirds of his then calculated AWW. By October 5,

1998, said payments had not yet been made to Claimant. As mentioned in the prior paragraph, Employer decided not to pay Claimant his full compensation benefits, until Claimant was awarded his Social Security Disability benefits. Subsequently, in May of 1999, Employer paid Claimant a lump sum, allegedly constituting, at least in part, full compensation benefits for that period. Claimant was never paid past due interest. (CX-20; CX-21; CX-22; CX-23; CX-24).

Moreover, although no payments were received by Claimant since February, 1998, Employer submitted an LS-207 on October 28, 1998, indicating compensation was being suspended because Claimant could perform sedentary work and was capable of earning pre-accident wages. Controversion was not timely and was misleading, since it suggested that compensation payments were continuing since last made in February, 1998.

I note an abundance of inconsistencies in the evidence and testimonies presented by both parties concerning prior compensation paid to Claimant, and Employer demonstrated inconsistencies and misrepresentations on department of labor forms, in testimony, and other evidence submitted to the record. Thus, taking the record as a whole, I determined that the information below is an accurate reflection of what was actually paid to Claimant. Still, when certain payments were made was not contained in the record, and the parties may need to submit such information to the District Director so that a proper calculation of interest and penalties owed may be made by the District Director.

Employer paid the following amounts to Claimant: (1) from October 24, 1999 to April 16, 2000, $378.51 every two weeks, which totals 24 weeks and $4,542.12; (2) from May 23, 1999 to October 24, 1999, $252.34 every two weeks, which totals 22 weeks and $2,775.74; (3) the sum of $14,214.01, covering September 1, 1995 to December 31, 1995; (4) the sum of $23,484.04, covering 1996; (5) the sum of $22,248.00, covering 1997; (6) the sum of $18,540.00, covering January 1, 1998 to October 31, 1998; (7) the sum of $8,667.05, covering July 13, 1995 to January 13, 1998; (8) the sum of $11,986.15, covering January 13, 1998 to May 23, 1999; (9) the sum of $1,707.42, cover February 1, 1998 to February 22, 1998. In short, Employer paid Claimant $78,486.05 in short and long term disability payments, which were treated as taxable and Claimant did not actually receive that full amount, as well as $29,678.48 in longshore compensation payments, totaling $108,164.53 paid to Claimant since his workplace accident and through April 16, 2000. (EX-4).

**C. Claimant's Testimony**

Aside from recounting his personal history, work history, the facts of his workplace injury, medical treatment received for said injury, and prior back problems, Claimant testified in detail concerning the effects of his workplace accident on his daily activities and capacities, and the consequent pain he endures. (Tr. 109-27, Tr. 243-48, 315). Claimant did not recall all of the details of his prior back problems, but

testified that he would have been treated at Browne for any such problems, and did not deny the occurrence of any such problems. Claimant recalled minor workplace injuries that occurred in 1992 and 1994, for which he sought treatment at Browne, but had no lost time at work and did not collect workers compensation. Claimant was not seen again at Browne until after his July 13, 1995 workplace accident, and upon that visit to Browne had been symptom free for over a year.

Claimant recounted the details of his workplace accident, specifying that he was straining to close a leaking valve, when he felt a popping sensation in his lower back, which was different than anything he had ever felt before because it shot down his leg. (Tr. 127-31). Claimant testified that he had to stay home from work the following day, Friday, July 14, 1995, because he developed severe stiffness and pain. Claimant testified that several people witnessed the accident, including another employee, who was turning the valve with Claimant, and Terry Roussel. Claimant immediately

reported to Rick Rykosky that he injured his back, and filled out a written report of the accident the following Monday, July 17, 1995.

Claimant first sought treatment, following his injury, from Dr. Sketchler with Browne, who prescribed mediation and instructed Claimant to do physical therapy exercises at home. (Tr. 132-38). Claimant testified that he reported to Dr. Sketchler that he stayed in bed the entire weekend because he was unable to move. Still, he returned to work Monday, July 17, 1995, but left early due to pain. Claimant testified that has not worked since that time due to constant pain, but for about one week, when he returned to work sometime around September.

Dr. Steiner examined Claimant, upon reference by Employer, on one occasion, August 25, 1995, due to persistent low back pain. (EX-18). Dr. Steiner ordered an MRI, which was completed September 25, 1995 and indicated a degenerative disc bulge at L4-5, with left-sided disc herniation at L5-S1. Subsequently, Dr. Sketchler referred Claimant to Dr. Miranne, who treated Claimant in November 1995 and recommended prompt surgery. Claimant testified that his symptoms had been consistent and persistent from the time of his July 13, 1995 injury until surgery, which constant symptoms Claimant had never experienced prior to said injury. (Tr. 138).

Concerning the physical pain arising from his workplace injury, Claimant testified that he experienced spasms, burning, numbness, and had difficulty "holding up" his back. (Tr. 138-39). Claimant testified the pain was more intense and different from anything he experienced in the past, which pain has even affected claimant's ability to walk normally. (Tr. 279-84, 318). Since his workplace accident, Claimant has difficulty with sexual potency, driving a car, bending at the waist, and cannot participate in the athletic activities he was involved in prior to his July 13, 1995 injury.

Claimant testified that his arm was numb from turning the valve, and he mentioned such to Rykosky, but Claimant could not recall if he included arm and hand pain or numbness in the accident report. (Tr. 248-56, 262-66, 274-76). In addition, Claimant could not recall if he reported anything to Dr. Sketchler about a neck injury, as his primary concern at the time was his back. Although the neck got progressively

worse. Claimant testified that he reported neck problems to Dr. Miranne in November 1995, but Dr. Miranne responded that he was only authorized to treat Claimant's back. Claimant testified that he reported to Dr. Miranne in July 1996 that his neck condition was aggravated when a door struck him in the back on Naval premises. Moreover, when Claimant completed the LS-203 on June 5, 1996, he did not include neck, arm or hand problems in the nature of his injury description, even though he testified that he was suffering from neck, arm and hand problems. (Tr. 266-74; EX-2, p.24; EX-20). Additionally, when Claimant completed a disability application on July 27, 1995 for continuance of his life insurance protection during total disability, he did not include any neck, arm, shoulder, or hand problems. Claimant again made no report of neck, arm, shoulder, or hand problems in a March 4, 1997 letter completed by him self to the Department of Labor concerning his claim for compensation. (CX-4).

Claimant saw Dr. Miranne on a referral from Dr. Steckler on November 1, 1995, who after reviewing the September 1995 lumbar MRI scan, opined that conservative management had been exhausted, and recommended surgery. (CX-25, pp. 46-48). Claimant saw Dr. Applebaum in January 1996, at Employer's request for a second opinion concerning surgery. Claimant reported to Dr. Applebaum, upon that visit, that he was having some neck and shoulder problems, as well as severe back problems. Dr. Applebaum ordered a myelogram/CT scan, which was completed in February 1996 and Dr. Applebaum ultimately confirmed Dr. Miranne's recommendation for surgery. (Tr. 139-43). Surgery was scheduled and on May 9, 1996, Claimant underwent a lumbar hemilaminectomy L5-S 1, with foraminotomy on the left. (EX-21, p. 5). Claimant testified that he received physical therapy near Methodist Hospital following his May 1996 back surgery.

Claimant admitted that he was in an automobile accident on February 17, 1996, which aggravated his neck and shoulder problems. In fact, Claimant testified that he did not consider his neck disabling until his automobile accident. (Tr. 314). Additionally, about six weeks after Claimant underwent back surgery in May 1996, a door hit Claimant in the upper back area while at the Naval Reserve, which seemed to further aggravate Claimants neck and shoulder problems, but did not affect Claimant's lower back. Claimant testified that the door incident at the Navy base is when the numbness and weakness in the hand coming down from the neck really increased. (Tr. 143). From then on, the neck progressively got worse and in February, 1997, Claimant had cervical surgery at the Veterans Administration Hospital. (Tr. 143-49, 256-62).

Following his February 1996 automobile accident, Claimant received treatment at Uptown Physical Medicine for his neck and shoulder. Claimant testified that he received a small settlement out of said automobile accident. Claimant testified that he did not provide Employer with the facts of his February 1996 automobile accident, or information concerning his subsequent treatment received for injuries sustained in said accident. Concerning Dr. Applebaum's 1998 report, wherein he indicated that Claimant mentioned an automobile accident in January 1997, Claimant testified that he was likely referring to the February 1996 automobile accident, as that was the only automobile accident he was involved in since his workplace accident. (Tr. 146, 317). Claimant testified that he has not completely recovered from his cervical surgery or lumbar surgery, as he still has weakness in his left arm radiating from his neck, as well

as burning in his neck. Moreover, Claimant would still rate the pain in his back as being about five times worse than the pain in his neck, with the back being the primary cause of his disability.

Due to chronic pain and the arthritic condition in his back, Claimant also developed sexual dysfunction beginning about 1996/1997, for which he was prescribed Viagra. (Tr. 149-51). Dr. Miranne and the VA Hospital have also prescribed Claimant Lodine, Elavil, Neurontin, Vioxx, Amitriptyline, Flexeril, which may be taken in place of the Amitriptyline, Tylenol #4, and Tylenol PM. Claimant testified that the Lodine, Tylenol #4, and Neurontin were narcotics that made him drowsy and warned against operating equipment and/or driving. Claimant testified that he is limited in his daily activities to no bending, stooping, lifting, prolonged sitting, and/or prolonged standing, per Dr. Miranne's orders and due to chronic pain. (Tr. 146-47, 276-79).

In reference to the FCE, Claimant testified that pain, Dr. Miranne's restrictions, and the possibility of further injury, prevented him from performing aspects of the FCE. (Tr. 278). In fact, Claimant testified that he informed Shetye that he was hurting, and Shetye insisted Claimant continue with the FCE.

Concerning the surveillance videos taken of Claimant performing certain activities, Claimant testified that the September 28, 1995, video of him cutting the grass was the only time he attempted cutting the grass since his workplace accident. Claimant testified the mower was self-propelled and I also noted during the hearing that Claimant still appeared to have difficulty pushing the mower, to which Claimant testified that he was, in fact, having difficulty pushing the mower. (Tr. 152-55, 279, 285-300). The video depicted Claimant taking his kids to school in his 1985 Chrysler, which he testified was about a five minute drive, going to the grocery, going to various hospitals, and carrying a brief case on October 4 and 6, 1995, which was about the time that Claimant returned to work for about a week subsequent to his workplace accident. The videos frequently depicted Claimant limping, putting his hand on his back for support, and Claimant's unique style of getting in and out of his car, which was due to pain. Claimant admitted that said activities often aggravated his symptoms and caused him pain.

Claimant denied any prior discussions with Employer about alleged absenteeism problems, but for an adjustment about what time he reported to work in the morning. Claimant also testified that sometimes his military duty schedule conflicted with Employer's scheduling needs. (Tr. 156).

Claimant testified that he was paid his full salary for some time following his July 14, 1995 accident, then full compensation, then two-thirds compensation, and then half salary, from which taxes, medicare, and social security payments were taken out of, and all of which pay had to be declared as income. (Tr. 157-60). Similarly, Claimant testified that he received lump sum payments of various amounts, but he was never told exactly what the payments were for. Claimant never received a weekly or biweekly check for around $500.00 from Carrier.

Claimant testified that he has not worked for a salary for anybody since he worked for Employer. Accordingly, he did no work for J. Masters, Inc., (Masters), in any capacity, subsequent to his July 13,1995 accident. (Tr. 300-06, 311-14). Claimant signed his interests in Masters over to Keith Morris

(Morris), his ex-business partner from Masters, retroactive to August 1, 1995. Claimant did not recall ever going to the Fashion Café, as Goldman testified below. Claimant testified that Morris was a snappy dresser, who drove a nice vehicle, which better fits the description of the person Goldman identified as working with him on the Fashion Café project. Conversely, as depicted in surveillance videos, Claimant drove an older model car and dressed primarily in athletic shorts and sweat pants. In addition, Claimant did some sedentary work for the Naval Reserve for about a year after his July 13, 1995 workplace accident, although he stopped drilling in 1995 due to his back injury. (Tr. 306-08).

Claimant applied for Social Security Disability benefits sometime around 1996, and began receiving such benefits some time around 1998. (Tr. 147, 160-64, 308-11). Claimant admittedly has not applied for a job as he was not physically able to sustain a job, and remained unable to work at the time of his hearing before me on the instant matter Claimant admittedly had not looked into a job within Dr. Miranne's lifting restrictions of five pounds, with no repetitive siting, standing, lifting, bending, crawling, or stooping, as he would not be able to go to work on a routine basis and sustain such a position. Claimant admitted that he may be able to work four hours one day, but this would leave him incapacitated the following day. Claimant testified that Employer classified him as totally disabled for purposes of Employer paying Claimant's group life insurance premiums. (CX-37). Furthermore, the Navy declared Claimant totally disabled after an examination by Naval physicians. (CX-34). Still, Claimant testified that he is willing to work if his condition improves.

**D. Testimony of Employer Witness, Edward L. Goldman**

Edward Goldman (Goldman), owner and operator of Wooden Stuff, Inc., (Wooden), testified at Claimant's hearing concerning work he did at the Fashion Café in New Orleans in February 1996 and during the summer of 1996. Employer presented Goldman to show that Claimant did work with Masters after his workplace accident. Wooden contracted with J. Masters, Inc., (Masters), a contracting company that was equally owned by Claimant with Morris through August 1, 1995, to provide the wooden portions of the balcony at Fashion Café. (Tr. 166-89; CX-30; CX-33). Goldman testified that he knew Claimant as a representative of Masters and often saw Claimant on the job site at Fashion Café in 1996. Goldman testified that Claimant came to the job site several times a day in February 1996 and once a day that summer of 1996, and that Claimant drove a nice car and dressed nice. Claimant was allegedly observed acting more or less in a supervisory capacity, and Goldman did not observe Claimant limping or exhibiting any outward signs of disability.

Goldman testified that he met Morris on one occasion, to negotiate their work contract, and knew of Morris. (Tr. 170-71). Moreover, Goldman testified that Masters owed Wooden in excess of $20,000.00, for which amount he was suing Masters at the time of the hearing. Goldman has had no contact with Morris since 1996, other than filing suit against Masters. Furthermore, Goldman testified that he would not have noticed if Claimant was wearing a brace when Goldman saw him in June or July of

1996, as Claimant was clothed, but Goldman testified that he would have noticed Claimant moving slowly, which he did not observe Claimant to be doing when he saw Claimant during the summer of 1996.

**E. Testimony of Employer Witness, Gregory A. Brown**

Gregory A. Brown (Brown), manager of insurance and claims for Employer testified that he was working for Employer in 1995, and was familiar with Claimant although he, Brown, was not Claimant's supervisor and only went to the plant about once a year. (Tr. 190-226). Brown testified about Claimant's duties which allegedly required no heavy lifting and Claimant's history of absenteeism in 1994 and 1995, due to alleged back problems. Brown's knowledge of alleged absenteeism was not based on personal experience with such, but review of back records, specifically one memo dated June 24, 1994, for which the attached calender was missing and said memo was never sent to Claimant. Jay O'Malley was the immediate supervisor responsible for attendance. (EX-17; Ex-25; Tr. 207).

Brown testified that Employer was not aware of Claimant's accident until July 17, 1995, when Claimant completed and filed a workers compensation claim. Yet, Brown did not initially investigate the July 13, 1995 incident and only talked to Rykosky and Tony Theveno about the accident in October 1995. Moreover, Brown was not present at the plant to know if Rykosky or Jay O'Malley were immediately notified of the incident and Brown could only surmise that Claimant was absent on July 14, 1995, the day following the incident, as there was no evidence of any verbal reprimand. (Tr. 208). Brown further testified that Claimant was released to work light duty on October 5, 1995, which he so worked for one week, beginning October 9, 1995, after which he did not return to work[4]. (EX-20, p. 95).

Brown testified that Dr. Miranne recommended surgery on Claimant's back on November 30, 1995, which recommendation Employer responded to by requesting a second opinion. Brown testified that Claimant subsequently saw Dr. Applebaum on January 24, 1996, who recommended a myelogram and CT scan, which was completed on March 22, 1996[5]. Brown also testified that Claimant reported to Dr. Applebaum on January 24, 1996 that he had a shoulder and arm problem, which was the first knowledge Employer had of Claimant's alleged neck problems. (Tr. 213).

Brown next testified that Claimant was paid short and long term disability, as opposed to benefits under the Act, because Employer did not want Claimant to take a cut in salary, further alleging that Employer paid Claimant his full salary from July 13, 1995 until December 15, 1995. I note this to be

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[4]. Supra footnote 2.

[5]. I note the medical records to indicate that Claimant's first examination by Dr. Applebaum was January 22, 1996, not January 24, 1996, and the myelogram/CT scan was completed March 21, 1996, not March 22, 1996.

contrary to the record, which indicates that Claimant was paid a lump sum of $14,214.01, at some unspecified time, covering September 1, 1995 to December 31, 1995, which was taxed prior to receipt by Claimant, and $8,667.05, covering July 13, 1995, to January 13, 1998.[6] (EX-4; EX-15). Additional conflicts were presented by Employer's LS-208, which indicated that Claimant was paid only $569.14 weekly from July 14, 1995 to February 21, 1998. (EX-2, p.17).

**F. Testimony of Employer and Vocational Rehabilitation Witness, Nancy T. Favalora**

Claimant met with vocational rehabilitation specialist, Nancy T. Favalora (Favalora), upon Employer's request, in November 1997, to determine job possibilities for Claimant. (Tr. 40). Favalora was deposed on May 30, 2000, by Claimant's counsel, Lloyd N. Frischhertz, and Employer/Carrier's counsel, Maurice Bostick. Favalora gathered personal background information on Claimant, as well as reviewing Claimant's work history, and medical treatment history related to his workplace injury. In addition, Favalora completed a vocational analysis of Claimant, which indicated that Claimant has acquired skills from past work that are transferable into a variety of employment settings. Claimant's past work require above average aptitudes in tasks dealing with verbal and numerical abilities. In addition, Claimant possesses a Masters degree in Management, which qualifies him to perform a variety of management jobs. (EX-1, pp. 1-4).

In short, Favalora opined that Claimant possesses two college degrees and has performed semi-skilled work in the past, thus he should be able to re-enter the labor market at that same level. As well, Claimant has demonstrated above average aptitude in general intelligence, which Favalora interpreted as indicating an ability to learn new job tasks. Favalora also indicated a need for a rehabilitation conference between herself and Dr. Miranne, to obtain Claimant's work restrictions and to determine the need for a rehabilitation conference. However, there was no evidence submitted to the record indicating that said conference was followed up on.

Following her initial report of January 13, 1998, Favalora completed a second vocational rehabilitation report on October 29, 1998, which took into consideration the Functional Capacity Evaluation (FCE) completed on April 21, 1998 by Randy Shetye (Shetye), as well as ongoing medical treatment history as provided by Drs. Applebaum and Miranne. (EX-1, pp. 5-8; Tr. 40-43). Orleans P.T.

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[6]. Furthermore, Employer's counsel presented in the post hearing brief that Claimant was paid his full salary until December 15, 1995, as indicated by Brown. Employer's counsel then presented in the supplemental post hearing brief that Claimant was paid his full salary from July 13, 1995 to August 31,1995, as indicated by the LS-206 Employer completed on January 26, 1998, both of which assertions I note to be in conflict with the benefits payment history. (EX-2; EX-4; EX-15).

& Sports Rehab Center, specifically Randy Shetye, P.T., completed the FCE on Claimant in four hours, during which Claimant passed only 6/22 validity criteria, indicating a submaximal effort; although, Claimant did not demonstrate any symptom exaggeration behavior. Claimant cannot bend, reach, climb, squat or kneel. He can alternate sitting, standing and walking throughout the workday. Note that Dr. Miranne limited the tests that Mr. Shetye could complete, based on Claimant's disability, thus the FCE could not be completed as it usually is.

Taking into consideration the FCE and Drs. Applebaum and Miranne's restrictions placed on Claimant, Favalora completed a labor market survey in the Greater New Orleans area, identifying appropriate positions for Claimant, based on his vocational profile. Still, Favalora admitted that she did not take into consideration the fact that Dr. Miranne testified Claimant could not work without experiencing pain. (Tr. 42). She admitted Dr. Miranne's five pound lifting restriction limits Mr. Worthy to only sedentary-type jobs, and in fact, not all sedentary-type jobs. (Tr. 42-44). Nevertheless, Favalora opined that Claimant could work in the sedentary to light category and she was unable to testify as to whether her labor market study considered less than full sedentary work. (Tr. 42-62). Favalora's October 29, 1998 report identified seven full-time positions, in the sedentary to light range, that she opined Claimant could perform using the skills and abilities he had acquired from past work. However, Favalora did not provide the identification of said Employers to Claimant or Claimant's counsel. (Tr. 48). Said positions were identified as follows:

> (1) a Claims Representative for a local insurance company where the worker will handle claims for automobile damage and bodily injuries. The position would be sedentary and in an office setting, completing paperwork. The worker could alternately stand and walk around the office area, and there is no lifting on the job. A bachelor's degree is preferred and on the job training is provided. The starting salary is $26,400.00 annually.
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> (2) a Materials Management Control Representative, where the worker is responsible for maintaining an automated inventory system, processing all purchase orders for stock inventory and non-stock purchases. This worker will act as a liaison between vendors and corporate buyers, as well as complete receiving documentation and weekly reports. Two years of college is required for this job. As Claimant has worked in material acquisition, this company would require that be coordinate inventory reordering and restocking plans. Exact wages for said position were not ascertainable, but similar positions in the area pay approximately $30,000.00 annually.
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> (3) a Manufacturing Manager to direct manufacturing operations. Supervisory experience and a degree in Management is required. The worker would manage the total manufacturing resources to reproduction schedules, and coordinate overall shop performance. It is an office position where the worker sits at a desk to complete his job tasks. He would also walk through the manufacturing areas to insure a quality work product. Starting wages are $35,000.00 annually.
>
> (4) a Production Control and Inventory Manager, where the worker would use an automated

production system to plan and schedule orders to meet customers' ship dates, and would be responsible for improving inventory accuracy, as well long term projects would be assigned. An undergraduate or graduate degree in Business, specializing in Management is preferred. Starting wages are $35,000.00 annually.

(5) a Budget Analyst, where the worker will perform budget preparation, review and monitor activities, prepare budgets and coordinate preparation and submission of project budgets for specific department(s), as well the worker will coordinate routine and requested statistical analyses and reports. Favalora opined that Claimant's Master's Degree in Management should qualify him for said position. Starting wages are $1,917.00 monthly.

(6) a Housing Authority Project Manager, where the worker will manage a number of low income public housing units, maintaining records concerning the projects, and referring tenants to appropriate social service agencies, as well as performing maintenance/visual inspections. He will also supervise subordinate personnel who are assigned to these projects. The position is a light job with starting wages of $1,666.00 monthly.

(7) a Maintenance Director, which consists primarily of administrative duties, such as planning, directing and coordinating the maintenance of all property and equipment under specific jurisdiction. He will direct a ground crew engaged in maintenance, direct, through shop foremen, the activities of skilled craftsman, and travel out along the levee for visual inspection. This position is light duty, with a starting salary of $2,512.00 monthly.

Favalora opined that Claimant could perform all of the jobs mentioned above, earning from $20,000.00 to $30,000.00 annually, with two of the positions starting at about $35,000.00 annually.

Favalora subsequently conducted an updated labor market survey in the New Orleans area and the Jackson, Mississippi area, the results of which were identified in an April 24, 2000 Vocational Rehabilitation Report. (EX-1, pp. 9-14). Additional file material was reviewed in preparation for this report, which included the following: (1) Dr. Applebaum's reports and deposition of March 27, 2000; (2) Shetye's deposition of January 12, 2000; (3) Claimant's deposition of February 8, 2000; (4) Dr. Miranne's deposition of September 16, 1998; and, (5) Dr. Jeffcoat's deposition of January 17, 2000. Taking into consideration the above mentioned depositions and reports, as well as Claimant's vocational profile, Favalora identified numerous additional full-time positions that she opined Claimant could perform using the skills and abilities he had acquired from past work. Said positions were identified as follows:

(1) a Manager Trainee for a national automobile rental company, which has offices in both the Now Orleans and Jackson areas, where the employee will prepare rental contracts and qualify individuals for the rental of vehicles. The employee will perform data entry and answer telephone calls, thus communication skills and customer service skills are required. The employee must have a valid driver's license and a good driving record, as well a college degree is preferred for said

position. The employee will alternate sitting, standing and walking throughout the workday. No heavy lifting or strenuous physical demands are involved, except on occasion, the employee will be required to wash vehicles. The starting salary in the Now Orleans area is $25,000 to $26,000 annually, and the salary in the Jackson, Mississippi area is $23,000 to $24,000 annually, with said position demanding about a fifty hour work week.

(2) a Project Manager for a parking company in New Orleans, where the employee would be responsible for marketing and day-to-day facility management to achieve maximum utilization of the location. Responsibilities include recruiting, training and administering supervision to employees. The employee would learn to provide accounting support, including revenue control, budget preparation and auditing the books, as well as preparing monthly reports. One or more years of supervisory experience is required, with a bachelor's degree in a business related field is required. The employee may alternate sitting, standing and walking, with lifting under 15 to 20 pounds. The salary is $28,000 to $31,000 annually.

(3) a Licensing Compliance Officer in the Technology Department of a medical center in New Orleans, where the employee will track legal expenses, technology revenue and financial transactions, as well as creating and maintaining data bases of technology records. Computer skills and a bachelor's degree are required. The position is an office job, which is considered sedentary, with no heavy lifting or strenuous physical demands. The salary range is $30,193 to $39,855 annually.

(4) a Staffing Coordinator for an employment agency, which has offices in New Orleans and Jackson, where the employee will interview applicants and pre-screen individuals to determine appropriate placement. The employee is responsible for filling job orders, maintaining a client bass and developing new business. The position requires the employee to be sales oriented. The employee will complete a training program, and a high school diploma is required. The position is an office job, and the employee can alternate sitting, standing and walking, with no heavy lifting or strenuous physical demands, but the employee will sometimes drive to meet with customers in the area. The salary is a base and commission for which the individual may earn $30,000 annually in New Orleans, and $20,000 annually in Jackson.

(5) a Credit Manager Trainee for a national company which has offices located in New Orleans and Jackson, where the employee will learn to perform credit investigation, loan interviewing and loan analysis work. The employee will perform collection work and sales work. A training program is provided for an individual with a bachelor's degree. The position is in an office job and the employee can alternate sitting, standing and walking, with no heavy lifting or strenuous physical demands. The starting salary in New Orleans and Jackson is about $25,000 to $27,000 annually.

(6) a Representative Trainee for an insurance company, which has locations in the New Orleans area, where the employee will handle insurance claims for automobile damage and bodily injuries,

and is responsible for investigating, appraising, estimating and settling both vehicle and personal injury claims. A college degree is preferred. Excellent communication, customer service, organizational skills, and a minimum of one year business experience is required. Training is offered. The position is sedentary and the employee will alternately stand and walk, with no heavy lifting or strenuous physical demands. The starting salary is $28,000 annually.

(7) a Claims Representative Trainee for an insurance company, which has locations both in the New Orleans and Jackson areas, has this position in which the individual will travel to locations in the area to give estimates on customers' automobiles and take statements regarding the injury/accident. This individual will evaluate, negotiate and settle auto and homeowners' claims while. A college degree is preferred, and good communication and writing skills are required. The individual will attend training classes. This position allows the worker to alternate sitting, standing and walking with the heaviest lifting is 10 to 15 pounds. The starting salary in the New Orleans area is $27,873 annually and $30,295 annually in the Jackson area.

(8) Several Civil Service positions for the State of Louisiana, which require a college degree and frequently hire, such as: a Compliance Program Specialist I, with salaries ranging from $1,565 monthly to $2,584 monthly; a Human Resource Analyst I, with salaries ranging from $1,674 monthly to $2,765 monthly; an Eligibility Examiner I, with salaries ranging from $1,462 monthly to $2,415 monthly.

Additionally, the following jobs were identified in the Jackson, Mississippi area:

(9) An Account Executive, where the employee will market contemporary financial and insurance products to new and existing customers, assist the branch manager with loan documentation, disbursement of proceeds, opening and closing the office, posting counter payments, and making deposits as necessary. The employee is also responsible for achieving personal sales goals attained through internal and external marketing of the company's loan products. Communication skills and a competitive sales drive are required. A management training program in offered. Previous sales experience is preferred. This position allows the worker to alternate sitting, standing and walking, with no heavy lifting, and an annual salary of $23,000 to $24,000, plus bonuses.

(10) An Administrative Assistant III, with Mississippi's Civil Service Department, where the employee will perform administrative duties, including devising and installing now work methods, interpreting rules and procedures and planning, and assigning and reviewing the work of technical and clerical employees performing general or specialized activities. A master's degree from an accredited four year college or university in Public Administration, Business Administration or related field or a Bachelors degree with one year work experience is required. The position is sedentary, and the worker may occasionally walk or stand, and sometimes will move light objects. The salary ranges from $19,956.40 to $29,494.60 annually.

(11) A Title Exam Motor Vehicle, with Mississippi's Civil Service Department, where the employee will perform detailed analysis of Motor Vehicle title applications and related source documents to ensure correctness. The employee will examine applications and supporting source documents to verify accuracy and to perfect a valid title. A high school diploma and two years of experience related to the above described duties are required. Related education and related experience may be substituted on an equal basis. The salary ranges from $15,9376.92 to $22,723.68 annually.

Favalora opined that Claimant could perform all of the jobs mentioned above, based on his Bachelor's Degree in Political Science and Master's Degree in Business Administration, as well, Claimant has performed semi-skilled work in the past as a maintenance supervisor. Favalora asserted that Claimant possessed the transferable skills and education to obtain a number of types of occupations in an office setting, such as the ones listed above and in previous reports, and that Claimant has an average wage earning capacity of $20,000 to $30,000 annually, with the jobs identified having wages of $22,000 to $24,000 annually in 1995.

Also of noteworthy significance, Favalora admitted that severe chronic pain may result in an inability to concentrate and work. (Tr. 53). In short, Favalora felt that Claimant could work all of the jobs she presented based on his education and past transferable skills, giving Claimant an average wage-earning capacity of $20,000.00 to $30,000.00 annually. (Tr. 62).

**G. Testimony of Thomas Meunier**

Thomas Meunier (Meunier), a licensed vocational rehabilitation counselor, was deposed on April 25, 2000 by Claimant's counsel, Lloyd N. Frischhertz, and Employer/Carrier's counsel, Maurice Bostick. Meunier is self-employed, has twenty-two years of experience, and is in private practice. (CX-39; CX-28; Tr. 64-108). Meunier interviewed and tested Claimant on March 10, 2000 for the purposes of vocational rehabilitation evaluation. Prior to that meeting, Meunier reviewed the medical, depositional, allied health, and Claimant's employment related records and information. (CX-28, p. 1). Meunier considered the April 1998 FCE invalid, and thus relied upon the physicians restrictions concerning Claimant's abilities. (Tr. 101). Meunier completed a vocational analysis of Claimant, which indicated that Claimant has acquired skills from past work that are transferable into a variety of employment settings. Claimant's past relevant work has been as a first-line supervisor for a petroleum products plant and an electronics board manufacturer, with his most recent work being for Employer and acting as a maintenance supervisor. In addition, Claimant is an honorably discharged U.S. Navy veteran, has an undergraduate degree in Political Science and a Masters in Business Administration from Troy State University in 1993, which he received while serving his time in the Navy. (CX-28, pp. 1-4).

In short, Meunier opined that Claimant had options with respect to entry level manager trainee and

other clerical/sales opportunities because he is a college graduate, with supervision experience. Based on contacts with employers at hotels, banks, hospitals, telecommunications companies, and retail businesses, Claimant could be considered for entry level positions within these organizations, with the exception of hospital settings. Although he could compete for a number of clerical/business office opportunities in a hospital setting, the opportunities to advance into management would be more difficult in such a setting without any medical background. In addition, middle management and other management opportunities which would require a masters in business administration would be difficult for Claimant to compete for since his degree was obtained 7 years ago and he does not have any management experience. His supervisory experience would be beneficial to him and would allow him to qualify for a number of entry level manager trainee positions. These entry level manager trainee positions as well as customer service representative positions offer starting wages ranging from $19,000.00 to $25,000.00 per year. (CX-39, pp. 5-8, 11-14, 17-24, 34).

On the down side, Claimant lacks computer skills, and would likely need to pursue formal training to update his skills with respect to current computer software and spreadsheets. (Tr. 76-77). With such training, Claimant could probably start out in an entry level position in a hotel, bank, telecommunication company or possibly credit department of a retail establishment and work his way up to a management position. He would also probably be physically restricted from being promoted into a management position requiring prolonged standing/walking. In short, most of Claimant's experience and skills has been as a working supervisor and not as an office manager or administrator, and, therefore, he would probably not qualify for most skilled managerial/administrative work of a sedentary nature. (Tr. 67-70, 83). Furthermore, Meunier expressed concern about Claimant's ability to maintain employment, after securing a position, due to chronic pain and the things that accompany chronic pain, as documented by Dr. Miranne, such as trouble with attendance. (Tr. 85-89). Likewise, Drs. Applebaum and Miranne's non-exertional restrictions on Claimant with respect to sitting and standing and lifting no more than five pounds per Dr. Miranne's orders, would significantly limit Claimant's ability to secure and maintain employment. Meunier disagreed with Favalora's identification of certain jobs in the $30,000.00 range, indicating that those jobs were based on transferable skills relative to Claimant's masters in business management, which he believes is of little or no benefit. (Tr. 90).

**H. Testimony of Randy Shetye, P.T.**

Randy Shetye, P.T., (Shetye) was deposed on January 12, 2000 by Employer/Carrier's counsel, Maurice E. Bostick, and by Claimant's counsel, Lloyd N. Frischhertz, Jr. Shetye is certified by the American Board of Physical Theraapist Specialist. (EX-11, pp. 5-9). Shetye recounted the details of Claimant's workplace accident and medical treatment received for injuries arising out of said accident. Claimant reported to Shetye that he injured his back while at work on July 13, 1995 and related his neck injuries to the subsequent automobile accident Claimant was involved in. (EX-11, pp. 14-15).

Shetye performed a functional capacity evaluation on Claimant on April 21, 1998, upon a referral by Favalaro. Claimant passed only six out of twenty two validity criteria during the FCE, suggesting a voluntary submaximal effort. Shetye testified that the profile suggested Claimant's disability may be out of proportion to his self pain reports. Although, Shetye admitted that he was unable to equate Claimant's FCE results with someone who was trying to appear more disabled than he was, as Shetye does not have the expertise to comment on the motivation behind Claimant's behavior.

Claimant reported to Shetye that he was sleeping or lying twenty one hours a day, walking or standing one hour a day, sitting two hours a day, and could drive or ride in a car for thirty minutes before needing a break. (EX-11, pp. 17-21). Shetye testified that Claimant was unable to bend when he asked Claimant to bend, yet Claimant could sit, as well as get in and out of his car, which required a certain amount of bending. Shetye was unable to complete the FCE because Claimant's pain level was high, and he did not want to push Claimant. Shetye testified that Claimant may have had anxiety regarding his pain or injuries, but it was a self limited behavior. Nonetheless, Shetye could not say that Claimant was exaggerating his pain, as Claimant had back and neck problems. Thus, Shetye testified that he gave him the benefit of the doubt and testified that Claimant did not put forth a good effort. (EX-11, pp. 32-38). Shetye admitted that ultimately Claimant's restrictions should be determined by the physicians. (EX-11, pp. 40-42).

**I. Testimony of Dr. Miranne**

Dr. Miranne, a neurosurgeon and Claimant's treating physician, was deposed on September 16, 1998 and again on April 19, 2000, by Claimant's counsel, Lloyd N. Frischhertz, and Employer/Carrier's counsel, Maurice Bostick. Dr. Miranne is board certified by the American Board of Neurological Surgery, as well as being licensed to practice medicine in Louisiana. Dr. Miranne acquired his Doctorate in Medicine in 1982 from Louisiana State University School of Medicine. (EX-26).

Claimant was initially seen by Dr. Miranne upon referral from Dr. Steckler on November 1, 1995. Claimant related a history of low back pain and left radicular leg pain, numbness, tingling and weakness. His condition was reported as getting worse, despite conservative treatment, physical therapy, medication and reduced activity. Dr. Miranne found not only sensory loss, but also neurological motor deficits and an absent left ankle reflex. He reviewed the September 1995 lumbar MRI scan, and like Dr. Steiner, diagnosed degenerative disc and bulging at L4-5 but specifically diagnosed a disc herniation at L5-S I on the left. Claimant had lumbar radiculopathy secondary to the ruptured disc. Dr. Miranne opined that conservative management had been exhausted, and recommended surgery, which Claimant accepted. (CX-25, pp. 46-48).

On November 15, 1995, Carrier informed Dr. Miranne they would not approve surgery and required a third opinion, despite Dr. Steiner's confirmation of a herniated lumbar disc with the possibility

of surgical intervention being needed. On January 22, 1996, about three months after Dr. Miranne recommended surgery, Claimant was seen by Dr. Applebaum, who recommended a lumbar myelogram and CT scan to determine whether cervical intervention was absolutely necessary. The lumbar and cervical myelogram and CT scans were performed March 21, 1996. Dr. Applebaum reported to Carrier on March 22, 1996 and noted bulging at C5-6 and bulging at L4-5. He noted a disc herniation at L5-S1 and recommended a lumbar laminectomy at L5-S I with removal of the disc. (Ex-20, p. 75).

On April 6, 1996, Dr. Miranne examined Claimant, who reported that his symptornatology had worsened. Upon that visit, Dr. Miranne indicated he would review the films and report whether surgery was still recommended. Claimant again saw Dr. Miranne on April 19, 1996. Dr. Miranne had reviewed the films and again saw the ruptured lumbar disc at L5-Sl, centrally and to the left, causing S 1 nerve root compression. (CX-25, pp. 44-45). Surgery was scheduled and on May 9, 1996, Claimant underwent a lumbar hemilaminectomy L5-S 1, with foraminotomy on the left. (EX-21, p. 5).

Claimant did not enjoy much relief from the surgery and on November 5, 1996, Dr. Miranne ordered a repeat lumbar MRI, which disclosed scar formation at the operative site, which appeared to encircle the proximal aspect of the left-sided S I nerve root. The MRI also showed an L5-S I right-sided bulge, a flattening of the posterior L4-5 disc, and dessication of L4-5 and L5-Sl. (EX-21, p. 2). The surgery was not successful and scar tissue encircled the left S 1 nerve root. Additionally, there was a symptomatic L4-5 disc. Dr. Miranne also ordered EMG nerve conduction studies which were performed by Dr. Fleming on December 17, 1996. The EMG study showed the chronic denervation in the L4-5 distribution on the left side, or chronic changes noted in the left L5 myotome consistent with old route injury or scar. (EX-22, pp. 2-4; CX-39). Claimant continued under the care of Dr. Miranne, post operatively, on a monthly basis, as well Claimant continued with restricted motion, pain, and diminished sensory and motor examinations. On July 15, 1996, Dr. Miranne noted cervical symptoms since recent injury suggestive of cervical radiculopathy.

Monthly visits continued with Dr. Miranne through 1996, 1997, and 1998. There was no change in his physical examination with continued motor weakness and diminished sensory and motor exams. Claimant continued on Lodine and narcotic medication. The monthly visits continued through 1999 and into 2000, with essentially no change or improvement in his condition, Claimant's complaints have been consistent and have never improved, but for worsened symptomology with exercise and activity. (CX-27, p. 10-11). Claimant was noted to remain in chronic pain with positive neurological signs, motor weakness, reduced sensory changes, diminished and absent reflexes. Dr. Miranne essentially indicated Claimant was totally disabled by virtue of his statements on Metropolitan Insurance forms, and his last recommendation of March 15, 2000, that Claimants activities should be as tolerated. (CX-25, p. 6; CX-37).

Dr. Miranne restricted Claimant to sedentary-type activities as of September 16, 1998. He disagreed with Dr. Applebaum's assessment that Claimant could do sedentary to light work and lift between 20 and 30 pounds. He indicated sedentary work would be more realistic, which would involve lifting no

more than 5 pounds and no standing long periods of time, mostly alternating standing and sitting. (CX-27, p. 14). He further stated that he felt it would be difficult for Claimant to work full time because of his persistent pain, even in sedentary activity.

Dr. Miranne placed Claimant at MMI one year post surgery, or May 9, 1997, and opined that if Claimant was able to do anything sedentary, Dr. Miranne thought it would have been one year post surgery. (CX-26, pp. 20-26). Claimant's condition has remained essentially the same since MMI, with examination consistently showing chronic sensory changes in the left S1 dermatome, absent ankle jerk on the left, and restriction of motion, all consistent with a chronically injured nerve root. Dr. Miranne testified that Claimant suffered from chronic pain, and as a result, Claimant would even have difficulty concentrating and doing sedentary work. In sum, Claimant's chronic pain, which may result from his permanent neurological findings, could present a problem in obtaining gainful employment. (CX-26, pp. 39-40; CX-27, pp. 6, 12).

Concerning possible inconsistencies presented by Claimant over the years of treatment, whether Waddle tests or any other tests, Dr. Miranne testified that Claimant has consistently presented with S1 symptomatology, pain in the appropriate dermatome fashion on the lateral aspect of the foot, and absent ankle jerk, which cannot be faked, and all of which provide an objective basis for pain. In short, there were never any inconsistent examinations and Dr. Miranne opined that Claimant suffered from dysesthetic nerve pain, which can be caused by a chronically injured nerve root. (CX-27, pp. 10-12).

Concerning Claimant's FCE administered by Shetye, and Shetye's report that Claimant indicated a submaximal effort, Dr. Miranne explained that there is subjectivity to the FCE and admitted that someone administering an FCE might certainly expect a better result than Claimant got. (EX-11, pp. 8-9, 62). Although, according to Dr. Miranne, Claimant's physical restrictions were significant and he had a five pound lifting restriction. Claimant, knowing his physical and lifting restrictions, as documented by Dr. Miranne, experiencing chronic pain, reacted with expected caution. The therapist, not realizing the extremely bad result from surgery, the permanent nerve damage, the scar tissue encircling the nerve root and the level of chronic pain, reported submaximal effort.

Dr. Miranne opined that Claimant may have had some prior back problems, which were tolerable, until Claimant's July 13, 1995, workplace accident aggravated the problems and resulted in Claimant's current condition of disability. (CX-26, pp. 37-40; CX-27, pp. 14-19). Dr. Miranne was informed of Claimant's past history of back treatment at the Browne-McHardy Clinic and of the prior MRI scan. Yet, given the history of further bulging on the repeat scan and the history that Claimant went over a year symptom-free before his July 13, 1995 accident, Dr. Miranne felt that Claimant's herniated disc was likely caused by the July 13, 1995, accident, and certainly aggravated, to the point he became disabled. Dr. Miranne testified, with the disc herniation he saw in Claimant, that he could not have gone over a year without seeing a doctor and doing his work. (CX-27, p. 18). Dr. Miranne believed Claimant's injuries of July 13, 1995 superimposed on his preexisting problems, made his current disability greater. Furthermore, Dr. Miranne testified that he did not believe Claimant's automobile accident, which occurred subsequent

to his workplace injury, had any permanent effect on his condition, as Claimant's physical findings were consistent. In short, Dr. Miranne opined that Claimant's nerve was injured beyond a certain point, preventing Claimant from making a full recovery.

Dr. Miranne did not relate Claimant's neck, arm or hand complaints to the July 13, 1995 workplace accident. (CX-26, p. 20). In fact, Dr. Miranne treated only Claimant's back problems, not his cervical problems. Moreover, he opined that the lack of success for Claimant's back surgery was due to the fact that the compression on the nerve persisted for a considerable period of time before surgical intervention, which was due to the fact that although Dr. Miranne recommended surgery November 1, 1995, it was not until May 9, 1996 that surgery was actually accomplished, resulting in chronic pain and a chronically injured nerve that could have been averted. (CX-26; CX-27, pp. 7-8, 22-24).

In discussing Claimant's prognosis, Dr. Miranne indicated that Claimant would be restricted to a sedentary lifestyle, put up with some pain, and take some medication chronically. Dr. Miranne opined that Claimant may be capable of some type of sedentary occupation, but would have to put up with discomfort. He felt Claimant would have to work part-time initially and work up to full time employment activity. Dr. Miranne indicated, when he testified concerning Claimant's disability, he was not taking into consideration his cervical injury. (CX-27, p. 22). He testified, more probably than not, Claimant's being left with chronic pain had to do with the delay in performing surgery.

**J. Testimony of Dr. Applebaum**

Dr. Robert L. Applebaum, a neurologist, was deposed on March 27, 2000 by Employer/Carrier's counsel, Maurice E. Bostick; Dr. Applebaum was again deposed on April 14, 2000 by Employer/Carrier's counsel, Maurice E. Bostick, and by Claimant's counsel, Lloyd N. Frischhertz, Jr. Dr. Applebaum is board certified by the American Board of Neurological Surgery. Dr. Applebaum acquired his Doctorate in Medicine in 1966 from Tulane School of Medicine, and is an active staff member at Touro Infirmary and St. Charles General Hospital. (EX-12, p. 48).

Dr. Applebaum recounted the details of Claimant's workplace accident and prior medical treatment received for injuries arising out of said accident. Dr. Applebaum first examined Claimant, upon reference by Employer, on January 22, 1996. Claimant reported pain in his left leg running into his heel, numbness in his left foot, pain in his left buttock and low back, and pain in his left leg. Claimant also noted some recent numbness in his left hand and some pain and numbness in his left shoulder and arm. This was rather sudden and onset approximately one prior to that examination, and was associated with an episode of severe coughing. He complained of some vague weakness in his left arm. (EX-12, pp. 6-10, 51-56; CX-38, pp. 8-9). At the time of examination, Claimant noted the pain was more severe in his left leg than in his low back or elsewhere. The pain in his left leg ran into his posterior thigh to his lateral calf and lateral

foot, with constant numbness in his left lateral foot. The pain was occasionally throbbing and occasionally aching in nature and present intermittently although it would occur daily. The pain would vary in intensity. It was increased with activity and diminished with bedrest. Claimant experienced some weakness in his left leg going up steps. He denied any significant pain in his neck or difficulty with the right arm.

Dr. Applebaum completed a neurological examination of Claimant. Examination showed minimal mechanical and neurological findings present in the lumbar region and no nerve irritation or other significant findings in the cervical spine. (EX-12, pp. 12-16; CX-38, p.11). Dr. Applebaum also reviewed the MRI of the lumbar spine performed on September 25, 1995. He interpreted said MRI as showing a very small disc present on the left paracentrally at the L5-S1 level, which he found to be minimally impressive, with his findings on exam also being minimally impressive.

Due to Claimant's prolonged symptoms and findings on examination, Dr. Applebaum recommended a lumbar myelogram and CT scan of the lumbar region to determine whether surgical intervention was necessary. He also recommended that Claimant have an evaluation of his cervical spine and a CAT scan of his cervical region while the dye was present, which would prevent Claimant from having a possible subsequent myelogram and CT scan at a later date. Although Dr. Applebaum did not think Claimant's cervical problem was related to his workplace accident.

The lumbar and cervical myelogram was performed on March 21, 1996 by DIS. (EX-12, p. 17). Dr. Applebaum interpreted the cervical myelograrn to show minimal bulging present at the C5-6 level, which appeared to be of no clinical significance. The CAT scan of the cervical region following myelography showed no evidence of a herniated disc or other significant abnormality. The lumbar myelogram was reviewed and showed some minimal bulging at the L4-5 level and a widened AMI at the L5-S1 level. Dr. Applebaum saw no lesions in the nerve roots on the myelogram. The CAT scan of the lumbar region following myelography showed some herniation of material at the L5-S1 disc space centrally and slightly paracentrally to the left. Consequently, Dr. Applebaum recommended a lumbar laminectomy at the L5-S1 level with removal of the disc, which lumbar laminectomy was completed by Dr. Miranne on May 9, 1996.

Dr. Applebaum reexamined Claimant on November 14, 1997, who reported that his symptoms at that time were worse than they were prior to the lumbar laminectomy. The pain was more severe and frequent. Claimant reported to Dr. Applebaum that he had electrodiagnostic studies performed since said surgery, as well as an MRI in November 1996. At the time of examination, Claimant complained of pain in both legs and in his low back. The pain was more severe in his left leg than elsewhere, which left leg was throbbing and burning in nature and would run to the posterior thigh and calf to the sole of his foot. The pain was constant and increased with activity and unchanged with bedrest. Claimant noted constant numbness on the sole of his left foot. (EX-12, pp. 18-24, 57-65). Claimant also complained of pain in the right leg which was diffuse and sharp in nature but present intermittently, but denied any weakness in the right leg. The pain occurred daily and increased with activity, and remained unchanged with rest. Additionally, Claimant noted intermittent numbness in the sole of his right foot. Claimant's low back area

ached and burned in nature. The pain increased with activity and remained unchanged with bedrest.

Claimant denied any reinjury since previously being seen by Dr. Applebaum on January 22, 1996. He was taking Elavil, Robaxin, and lbuprofen for relief of symptoms. Dr. Applebaum's examination of Claimant was limited to the back and lower extremities, with marked limitation of motion present in the lumbar region. However, no paraspinous muscle spasm was present in the lumbar region and a normal lumbosacral curve was noted. Dr. Applebaum considered the November 14, 1997 exam to show similar physical findings as the prior exam on January 22, 1996. (CX-38, pp. 36-37).

Dr. Applebaum reviewed the MRI of the lumbar spine performed on November 5, 1996. The MRI showed scarring present at the L5-S1 level on the left with very slight enhancement. He saw no evidence of a recurrent herniated disc. There was some minimal bulging at the L4-5 disc, which Dr. Applebaum deemed clinically insignificant. In summary, that diagnostic study indicated scarring consistent with Claimant's previous surgery but no evidence of a surgical lesion.

In short, Dr. Applebaum opined that Claimant had reached MMI by that November 14, 1997 examination, and needed an FCE, as well Claimant could return to some form of moderate work which would involve no prolonged bending or stooping or lifting any loads greater than thirty to forty pounds.

Dr. Applebaum reexamined Claimant's neck, back, arms, and legs on June 26, 1998. Claimant reported similar complaints of pain in the lower back and extremities, with the added problem of a constant aching and burning pain in his neck, and examination elicited similar pain responses, but with added symptom of pain production upon compression of the cervical spine. Claimant noted occipital headaches associated with the neck pain. Claimant reported to Dr. Applebaum that he was involved in a motor vehicle accident in January of 1997[7], which is when he began having increased neck pain. Claimant saw a physician at that time, the name of which he cannot recall. Claimant was treated with analgesics and physiotherapy, after which his symptoms intermittently improved and recurred. (EX-12, pp.25-30, 60).

Subsequent to his motor vehicle accident, Claimant had a repeat myelogram and CAT scan done in February 1997 at the VA, following which Dr. Hersch performed surgery on Claimant's neck. Following neck surgery, Claimant began wearing a cervical collar, which affords him some relief of his symptoms. The VA Hospital also treated Claimant for a nodule on his wrist around May 1998, and about that time, an MRI of the cervical spine was recommended and performed. After Dr. Applebaum's June 26, 1998 examination of Claimant, the doctor opined that Claimant could return to light work, with no

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[7]. Concerning Dr. Applebaum's 1998 report, wherein he indicated that Claimant mentioned an automobile accident in January 1997, Claimant testified that he was likely referring to the February 1996 automobile accident, as that was the only automobile accident he was involved in since his workplace accident. (Tr. 146, 317).

prolonged bending or stooping, or lifting any loads greater than twenty to thirty pounds. (EX-12, pp. 28, 61).

Dr. Applebaum last examined Claimant on February 23, 2000, due to Claimant's continued complaints of pain, consistent with prior pain complaints of chronic low back pain and some recent neck pain. Said pain was worse with activity and diminished with rest. Examination was limited to Claimant's neck, back, and extremities. Moderate limitation of motion was present in the cervical area, which appeared to be voluntary in part. No paracervical muscle spasm was present. Compression of the cervical spine reproduced some pain at the base of the neck. Moderate limitation of motion was present in the lumbar area, which appeared to be voluntary in part. No paraspinous muscle spasm was present in the lumbar region. A normal lumbosacral curve was noted. (Ex-12, p. 31-33, 37-39, 63-64).

Dr. Applebaum's final examination of Claimant showed slight improvement in his findings, and Dr. Applebaum again opined that Claimant had reached MMI with regards to his back, thus recommending no further neurosurgical, diagnostic or therapeutic procedures. Dr. Applebaum felt that Claimant's back problems were aggravated in part and exacerbated by his accident of July, 1995. He felt there was evidence of impairment and problems in Claimant's back which pre-existed his July, 1995 workplace accident and which would have caused his current impairment to be greater than it would without his pre-existing back condition. Dr. Applebaum further opined that Claimant's neck problems were not caused by his workplace accident in July, 1995, but rather his motor vehicle accident in 1997. Still, most of Claimant's impairment related to his back and less so to his neck. Claimant would have about a 10-15% impairment of the body as a whole with approximately one-fourth of that being attributed to his neck. Dr. Applebaum testified that Claimant could return to some form of light to moderate work with no prolonged bending, stooping, or lifting any loads greater than twenty to thirty pounds. (EX-12, pp. 40-41).

In addition, in a March 23, 2000 memo to Claimant's chart, Dr. Applebaum noted that he reviewed video surveillance taken of Claimant, and Claimant's actions in November 1997, correlating to Claimant's November 14, 1997 examination by Dr. Applebaum, were consistent with Dr. Applebaum's opinion regarding Claimant's physical limitations at that time, and that Claimant could return to some form of moderate work at that time. (CX-38, p. 62; EX-12, pp. 43-45, 65).

## IV. DISCUSSION

### A. Contentions of the Parties

Claimant asserted that: (1) he sustained an injury in his July 13, 1995 workplace accident, from which he remains permanently and totally disabled; (2) that his Naval Reserve pay should be included in his AWW, and the parties have stipulated that if Claimant's Naval Reserve pay received during the year

prior to the accident is to be included in the calculation of his weekly wage, it would be $995.38, and if it is not to be included, it would be $858.82, and as such, the AWW should be $995.38; (3) that Employer received Notice of Injury on the date of the injury, July 13, 1995; (4) that Employer's Notices of Controversion of August 6, 1996, and October 28, 1998 were untimely; (5) Claimant's date of MMI should be controlled by the opinion of his treating physician, Dr. Miranne; and, (6) Claimant does not contest Employer's possible entitlement to 8(f) but asserted that the total payments made as wages and short-term and long-term disability cannot be credited against compensation under the Act because Claimant was taxed and did not receive the full amount paid;[8] and, (7) he is entitled to medicals for his cervical problem under Section 7 of the Act.

Employer asserted that: (1) Claimant's testimony is not credible; (2) Claimant did not incur an injury as a result of his July 13, 1995 workplace accident; (3) Claimant is not permanently and totally disabled as a result of his July 13, 1995 workplace accident; (4) Claimant is capable of earning substantial wages near his pre-accident wages; (5) Claimant's Naval Reserve pay should not be included in his AWW; (5) Employer offered suitable alternative employment through the labor market survey completed by vocational rehabilitation specialist, Favalora (6) Claimant's date of MMI was one year post surgery, as determined by Dr. Miranne, which surgery Dr. Miranne completed in May 1996, thus MMI was reached in May 1997[9]; (7) Claimant's cervical injury did not occur at Employers, and thus Employer is not liable for Section 7 medicals under the Act for Claimant's cervical problems; and, (8) Employer is entitled to Section 8(f) relief under the Act.

**B. Credibility of Witnesses**

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); Todd Shipyards Corporation v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc., and Hartford Accident & Indemnity Co.,

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[8]. I note that at the hearing before me on the instant matter, it was requested that Employer provide Claimant with the necessary IRS documents for him to show that the receipt of those payments should have been identified as compensation benefits and not wages or disability payments under a health care plan, so that Claimant could file and amended return and receive a rebate. Employer failed to provide any such documents.

[9]. I note that in their post-hearing brief, Employer's counsel asserted that Claimant reached MMI as determined by Dr. Miranne, which was one year post surgery, or November 1996. However, one year post surgery would be May 1997, not November 1996.

v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule, which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d), and that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S. Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993); Director, OWCP v. Maher Terminals, Inc., 114 S. Ct. 2251 (1994).

Employer attacked Claimant's credibility stating that their reason for discrediting Claimant's truthfulness was that Claimant's FCE results which Employer claims shows submaximal effort with pain exaggeration. However, as Shetye admitted that he was unable to equate Claimant's FCE results with someone who was trying to appear more disabled than he was, as Shetye does not have the expertise to comment on the motivation behind Claimant's behavior and could not say that Claimant was exaggerating his pain, as Claimant had back and neck problems and further that Claimant's restrictions should be determined by the physicians. (EX-11, pp. 40-42).

Employer next argued that Claimant's indicated a lack of credibility when he reported to Dr. Applebaum his previous back and leg injury in 1994, which resolved in about one week and denied any other difficulty with his back or legs while failing to mention prior back problems in 1989, 1991, and 1992. (EX-12, pp. 8-9; Tr. 122-24).

Employer further argued in their post-hearing brief that Dr. Applebaum noted inconsistent signs upon his November 14, 1997 examination of Claimant and that throughout all of his examinations of Claimant, even after the lumbar and cervical surgeries, he did not observe any objective medical evidence to justify Claimant's continued lumbar and cervical complaints or problems. However, I note that in Dr. Applebaum's March 27, 2000 deposition, he testified that there were some findings that were objective. (EX-12, p. 24). Employer also presented Dr. Applebaum's last report on Claimant, dated March 23, 2000, as somehow putting Claimant's credibility at issue. However, I fail to see that said report put Claimant's credibility at issue. (EX-12, p. 65).

Employer next argued that Claimant's credibility was undermined by Dr. Jeffcoat's observation that Claimant exaggerated his symptoms and became rigid and say he could not perform certain movements upon request to do so by Dr. Jeffcoat, who notably examined Claimant on one occasion. Dr. Jeffcoat testified that Claimant seemed to be somebody that exaggerated what was being done when he asked him to do something, and that the results of Claimant's FCE were consistent with malingering. (EX-13, pp. 10, 20). As well, Employer argued that Claimant's history of limited daily activities as reported to Dr. Jeffcoat on April 1, 1999, was contrary to Claimant's activities as observed on video surveillance. (EX-3). As prior noted, due to the erroneous and limited information upon which Dr. Jeffcoat formed an opinion about Claimant's condition, I attach no weight to Dr. Jeffcoat's testimony regarding Claimant and further find

Employer's argument that Claimant's credibility was somehow undermined by Dr. Jeffcoat's observations to be meritless.

In an attempt to further undermine Claimant's credibility, Employer asserted that Claimant's inability to recall many details about his medical history of back problems prior to his workplace accident, indicated a lack of credibility on Claimant's behalf. (Tr. 243-48). I note that Claimant recalled some, but not all, of his medical history, but was forthright about his inability to recall certain events and did not deny that the events about which he was questioned occurred.

Employer further alleged that Claimant's testimony concerning limitations in his daily activities was inconsistent with Claimant's activities as observed in surveillance videos. (Tr. 149, 152, 280, 284-85). I disagree with Employer's assertions, and note the surveillance videos to be consistent with the fact that Claimant was greatly limited in his daily activities. Specifically, Employer asserted that Claimant demonstrated a lack of credibility when he denied the lawnmower, with which he was depicted cutting the grass on September 28, 1995, was a push mower despite the fact that he had to push the mower to go forward. I find this argument to be without merit, and note that Claimant testified the mower was self-propelled, meaning he had to hold the handle down for the mower to propel forward. I also noted during the hearing that Claimant appeared to have difficulty pushing the self-propelled mower in the surveillance videos, to which Claimant testified that he was, in fact, having difficulty pushing the mower.

Employer also alleged that Claimant demonstrated a lack of credibility at the hearing by his denial of performing any work with J. Masters, Inc. after his July 13, 1995 workplace accident. Employer presented Goldman's testimony as indicating that Claimant did work with Masters after his workplace accident. In light of the fact that Goldman has a suit against Masters, as well as inconsistencies in Goldman's testimony, I discredit Goldman's testimony concerning his assertion that Claimant actually worked for Masters after his injury. (Tr. 166-89). Claimant testified that he and Morris started Masters as a partnership, subsequently incorporated, and as of August 1, 1995 they terminated the business due to inactivity and Claimant's lower back disability. (CX-30; CX-33). Claimant did not work for Masters subsequent to his workplace accident and Masters did not generate any revenue after Claimant's workplace accident. I find nothing in the record inconsistent with Claimant's testimony concerning Masters. In sum, taking all of the evidence presented, medical and otherwise, and taking the entire circumstances into consideration, I find that Employer did not present a basis to discredit Claimant's testimony.

**C. Prima Facie Case, Causation, Nature and Extent of Disability, and Suitable Alternative Employment**

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions

existed at work, which could have caused the harm or pain. Kier v. Behlehem Steel Corp., 16 BRBS 128 (1984); Kelaita, *supra*. Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980); Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966); Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); Kier, *supra*. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. Brown v. Pacific Dry Dock, 22 BRBS 284 (1989); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1981); Holmes v. Universal Maritime Serv. Corp., 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. Sprague v. Director, OWCP, 688 F.2d 862 (1st Cir. 1982); Holmes, *supra*; MacDonald v. Trailer Marine Transport Corp., 18 BRBS 259 (1986).

In this case, the parties have stipulated that an accident occurred in the course and scope of Claimant's employment with Employer, on July 13, 1995. Claimant sustained physical harm and pain, as established by the record, including the medical evidence as presented by Drs. Miranne, Sketchler, Steiner, and Applebaum. Thus, Claimant established his prima facie case, creating a presumption under Section 20(a) that the his injury arose out of employment. To rebut the presumption, Employer would have had to present substantial evidence severing the connection between such harm and employment or working conditions, which Employer presented failed to do. Employer argued that Claimant's had a serious pre-existing back condition prior to his July 13, 1995 workplace accident, as testified by Drs. Applebaum and Jeffcoat. Yet, I note that Dr. Applebaum indicated that Claimant's pre-existing condition was, in fact, aggravated by Claimant's July 13, 1995 workplace injury. Moreover, treating physician, Dr. Miranne, related the onset of Claimant's disability to Claimant's workplace accident, who treated Claimant consistently for a period of many years, thus I credit said testimony over Dr. Jeffcoat's, which was based on erroneous, incomplete information. Consequently, I find that Claimant is entitled to rely on the presumption supplied by Section 20(a) of the Act. However, this presumption does not establish entitlement to either compensation or benefits under the Act until Claimant establishes the nature and extent of his disability.

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either nature (permanent or temporary) or extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968);

Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1989); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that the claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. Hite v. Dresser Guiberson Pumping, 22 BRBS 87, 91 (1989); Care v. Washington Metro. Area Transit Authority, 21 BRBS 248 (1988).

An employee is considered permanently disabled if he has any residual disability after reaching MMI. Lozada v. General Dynamics Corp., 903 F.2d 168, 23 BRBS (CRT) (2d Cir. 1990); Sinclair v. United Food & Commercial Workers, 13 BRBS 148 (1989); Trask v. Lockheed Shipbuilding & Construction Co., 17 BRBS 56 (1985). A condition is permanent if Claimant is no longer undergoing treatment with a view toward improving his condition, Leech v. Service Engineering Co., 15 BRBS 18(1982), or if his condition has stabilized. Lusby v. Washington Metropolitan Area Transit Authority, 13 BRBS 446(1981). If the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that MMI has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245(1986); Mills v. Marine Repair Serv., 21 BRBS 115, 117(1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142(1978), *aff'd mem.*, 617 F.2d 292 (5th Cir. 1980).

I find that, in the instant case, Claimant reached MMI by May 9, 1997, as indicated by both Employer's counsel and Claimant's counsel in their respective post-hearing briefs, and as determined by Dr. Miranne. (EX-21, p.5). Thus, although this was presented by both parties as an issue for me to resolve, I accept the mutually consistent opinions of Employer's counsel and Claimant's counsel, based on Dr. Miranne's medical expertise, that Claimant reached MMI one year post-lumbar hemilaminectomy, on May 9, 1997.

Furthermore, the Act does not provide standards to distinguish between classifications and degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, Claimant must establish that he can no longer perform his former longshore job due to his job-related injury. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); P&M Crane Co. v. Hayes, 930 F.2d 424, 429-30 (5th Cir. 1991); SGS Control Serv. v. Director, Office of Worker's Comp. Programs, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171(1986).

Claimant established his prima facie case of total disability through Drs. Steiner, Applebaum, and Miranne's medical testimony and the restrictions placed on Claimant limiting him to a less strenuous position

than his previous job. Thus, in the instant case, I have relied on the medical testimony that Claimant suffered from an exacerbation of a pre-existing condition, and restrictions were placed upon Claimant limiting his work were due to said aggravation. Thus, shifting the burden to Employer to prove that they provided Claimant with SAE.

Once the case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment (SAE). Turner, 661 F.2d at 1038; P&M Crane, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261(1988). Total disability becomes partial on the earliest date on which the employer establishes SAE. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (D.C. Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. Conover v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 676, 679 (1979). If employer does not offer suitable work at its facility, the Fifth Circuit in Turner, established a two-pronged test by which employers can satisfy their alternative employment burden:

> (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.
>
> 661 F.2d at 1042; P&M Crane, 930 F.2d at 430.

If the employer meets its burden by establishing SAE, the burden shifts to the claimant to prove reasonable diligence in attempting to secure some type of SAE shown within the compass of opportunities, by the employer, to be reasonably attainable and available. Turner, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. Applebaum v. Halter Marine Serv., 19 BRBS 248 (1987). Moreover, if the claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). If the claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. Turner, 661 F.2d at 1043; Southern

v. Farmers Export Co., 17 BRBS 64 (1985).

In the instant case, as noted above, Claimant established his prima facie claim of total disability, shifting the burden to Employer to establish the existence of SAE during that period of disability. Employer failed to meet this burden. An employer offered position does not constitute suitable employment if is found to be too physically demanding for Claimant to perform. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Mason v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984).

Claimant met with Favalora, a vocational rehabilitation specialist, upon Employer's request, in November 1997, to determine job possibilities for Claimant. (Tr. 40). In her October 29, 1998 report, Favalora completed a labor market survey identifying seven full-time positions, of sedentary and light work, at eight hours per day, that she opined Claimant could perform. Favalora identified eleven additional full-time positions that she opined Claimant could perform, using the skills and abilities he had acquired from past work. (EX-1, pp. 9-14). Said positions were identified in Favalora's April 24, 2000 report. Favalora opined that Claimant could perform all of the jobs mentioned above, earning from $20,000.00 to $30,000.00 annually.

Claimant also met with Meunier, a licensed vocational rehabilitation counselor, on March 10, 2000 for the purposes of vocational rehabilitation evaluation. (CX-28). Meunier considered the April 1998 FCE invalid, and thus relied upon the physicians restrictions concerning Claimant's abilities. (Tr. 101). Meunier opined that Claimant had options with respect to entry level manager trainee and other clerical/sales opportunities because he is a college graduate, with supervision experience. These entry level manager trainee positions as well as customer service representative positions offer starting wages ranging from $19,000.00 to $25,000.00 per year. (CX-39, pp. 5-8, 11-14, 17-24, 34).

However, Meunier expressed concern about Claimant's ability to maintain employment, after securing a position, due to chronic pain and the things that accompany chronic pain, as documented by Dr. Miranne, such as trouble with attendance. (Tr. 85-89). Likewise, Drs. Applebaum and Miranne's non-exertional restrictions on Claimant with respect to sitting and standing and lifting no more than five pounds per Dr. Miranne's orders, would significantly limit Claimant's ability to secure and maintain employment. Meunier disagreed with Favalora's identification of certain jobs in the $30,000.00 range, indicating that those jobs were based on transferable skills relative to Claimant's masters in business management, which he believes is of little or no benefit. (Tr. 90).

The record indicated to me that Favalora's labor market survey did not take into consideration limitations placed on Claimant's capacity to work by Dr. Miranne, including a five pound lifting restriction and Claimant's inability to work without pain. In fact, none of the jobs identified were even presented to Claimant's treating physician, Dr. Miranne, for approval.

In addition, the Board has consistently held that credible complaints of subjective symptoms and

pain can be sufficient to establish the element of physical harm necessary for a prima facie case for Section 20(a) invocation. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236(1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, the judge may properly rely on the claimant's statements to establish that he experienced a work-related harm, and where it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in the case.

Furthermore, pain is a concept which can be disabling, and not just to make a prima facie case. A claimant's credible testimony alone, without objective medical evidence, on the issue ofthe existence of disability may constitute a sufficient basis for an award of compensation. Ruiz v. Universal Maritime Service Corp., 8 BRBS 451, 454 (1978); Eller & Co. v. Golden, 620 F.2d 71,12 BRBS 348 (5th Cir. 1980). In addition, claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that claimant can perform certain types of work activity. Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941, 25 BRBS 78 (5th Cir. 1991). When the facts support a finding in favor of either party, the choice between reasonable inferences is left to the administrative law judge and may not be disturbed if it is supported by the evidence. Id. at 945, 81.

I credit Claimant's subjective complaints of pain and physical limitations, which are supported by diagnostic studies, as well as the testimony of treating physician, Dr. Miranne, and find that Claimant does not have the capacity to perform any of the jobs identified by Favalora or Meunier on a sustained and consistent basis and thus Employer failed in its burden to prove that they provided Claimant with SAE. (EX-18, p. 15). Thus, Claimant is entitled to temporary total disability from the date of his injury to May 8, 1997, and to permanent total disability thereafter or from May 9, 1997, the date of MMI, to the present and continuing.

**E. Necessary and Reasonable Medical Expenses**

Pursuant to Section 7(a) of the Act, 33 U.S.C. § 907(a), Employer is responsible for reasonable and necessary medical expenses that are related to Claimant's compensable injury. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979); Pardee v. Army & Air Force Exchange Serv., 13 BRBS 1130(1981). In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258(1984). The claimant must establish that the medical expenses are related to the compensable injury. Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the

work injury, and not due to an intervening cause. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982) (per curiam), *rev'g* 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc.,16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. Maryland Shipbuilding & Dry Dock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).

Section 7(d)(2) of the Act provides in pertinent part that:

> (2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

33 U.S.C. § 907(d)(2).

Claimant argued that Employer should be liable for reasonable and necessary medical expenses for his cervical injuries under Section 7 of the Act. However, as overwhelmingly indicated by the record, Claimant's neck injuries are not a consequence of Claimant's work-related accident. Claimant denied any significant pain in his neck or difficulty with the right arm to Dr. Applebaum upon his initial visit in January 1996 to Dr. Applebaum. As well, Claimant denied neck pain in presentation to Drs. Applebaum and Miranne, until after his February 1996 automobile accident. In fact, it was not until July 15, 1996, that Dr. Miranne noted cervical symptoms since recent injury suggestive of cervical radiculopathy, which would be five months of Claimant's automobile accident, yet over a year since Claimant's workplace accident. Thus, Employer is not responsible for payment of medical benefits for treatment of Claimant's neck injuries.

**F. Average Weekly Wage**

The issue before me is whether Claimant's Naval Reserve pay should be included in calculating his average weekly wage. As such, section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the same employment ... whether for the same or

another employer, during substantially the whole year preceding his injury." 33 U.S.C. § 910(a). Empire United Stevedores, 936 F.2d at 821; Duncan v. Washington Metro. Area Transit Authority, 24 BRBS 133, 135-36(1990).

Claimant, the entire time while employed with Employer from 1989 until his injury, was in the Naval Reserve and had yearly earnings. Claimant's disability resulted in him not only being unable to return to his former employment but caused him to be medically retired from the Service. Claimant's average annual earning included his earnings from the Navy and was part of his annual earnings since the early 1980's, and was thus part of his annual earnings to be included in calculating his average weekly wage. Claimant lost these wages as a result of his work related injury. It is an exceedingly rare case where the claimant's earning at the time of injury are wholly disregarded as irrelevant, unhelpful, or unreliable. The goal is to gauge the amount that the employee would have the potential and opportunity of earning absent the injury. Empire United Stevedores, 936 F.2d at 819. The Benefits Review Board specifically addressed this issue and held that earnings from a second part time job, held at the time of injury, are included in computing ones average weekly wage. *See* Lawson vs. Atlantic & Gulf Grain Stevedores Co., 6 BRBS 770 (1977); Stutz v. Independent Stevedore Co., 3 BRBS 72 (1975).

Claimant's ability to earn wages, both for Employer and the Navy, were affected by his July 13, 1995 workplace injury. As such Claimant's Naval Reserve pay should be included in his AWW, and as the parties stipulated, if Claimant's Naval Reserve pay received during the year prior to the accident was to be included in the calculation of his weekly wage, Claimant's AWW is $995.38 with a corresponding compensation rate of $663.59.

**G. Timely Controversion**

Section 14(b) of the Act provides that the first installment of compensation becomes due on the fourteenth day after the employer has been notified pursuant to Section 12(d), 33 U.S.C. §912(d), or after the employer has knowledge of the injury. 33 U.S.C. §914(b). Section 14(d) sets forth the procedure for controverting the right to compensation, and it provides that an employer must file a notice of controversion on or before the fourteenth day after it has received notice pursuant to Section 12(d) or after it has knowledge of the injury. 33 U.S.C. §914(d); *see also* Spencer v. Baker Agricultural Co., 16 BRBS 205(1984). Section 14(e) mandates that if an employer fails to pay benefits in accordance with Section 14(b) or timely controvert the claim in accordance with Section 14(d), then it shall be liable for a 10 percent penalty added to unpaid installments of compensation. Scott v. Tug Mate, Inc., 22 BRBS 164 (1989); Frisco v. Perini Corp., 14 BRBS 798(1981). The Board has held that an employer need not file a notice of controversion until it is aware of an actual controversy. Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979); however, it has rejected the argument that there is no controversy until a claim has been filed under the Act. Maddon v. Western Asbestos Co., 23 BRBS 55(1989); Spear v. General Dynamics Corp., 25 BRBS 132 (1991).

I note that although Claimant did not raise the issue of a penalty under Section 14(e) before the administrative law judge, concerning the initial untimely notice of controversion, which was filed by Employer over one year after notice of injury, this issue may be raised at any time, as Section 14(e) provides for a mandatory penalty. Furthermore, Claimant did raise the issue of timely controversion concerning Employer's October 28, 1998 Notice of Controversion. *See* Scott, 22 BRBS at 164. In the instant case, the parties stipulated, and the evidence established, that Employer received notice of Claimant's July 13, 1995 injury by July 17, 1995, at the latest, and did not file a notice of controversion until August 6, 1996. Then Employer submitted a misleading LS-206 on January 26, 1998, suggesting that they were voluntarily paying Claimant $574.84 a week, or two thirds of his then calculated AWW. By October 5, 1998, said payments had not yet been made to Claimant. Moreover, although no payments were received by Claimant since February, 1998, Employer submitted an LS-207 on October 28, 1998, indicating compensation was being suspended because Claimant could perform sedentary work and was capable of earning pre-accident wages. Controversion was not timely and was misleading, since it suggested that compensation payments were continuing since last made in February, 1998.

Thus, I note that Employer failed to file a timely notice of controversion with the initial LS-207, filed August 6, 1996, and again with the October 28, 1998 LS-207, and, as a matter of law, Employer is liable for a Section 14(e) penalty on both accounts. A Section 14(e) assessment is properly imposed on only those compensation installments which were due and unpaid prior to Employer's filing of a notice of controversion. *See* Pullin v. Ingalls Shipbuilding, Inc., 27 BRBS 45 (1993)(order on recon.), *aff'd on recon.*, 27 BRBS 218 (1993); Cox v. Army Times Publishing Co., 19 BRBS 195 (1987). However, when certain payments were made was not contained in the record, and the parties may need to submit such information to the District Director, so that a proper determination of what installments were due and unpaid prior to the filing of said Notices of Controversion can be made by the District Director, and a proper calculation of penalties owed may be made by the District Director.

**H. Section 8 (f) Relief**

Section 8(f) is invoked in situations where a work-related injury combines with a pre-existing partial disability to result in greater permanent disability than would have been caused by the injury alone. Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1144, 25 BRBS 85 (CRT) (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. Jenkins v. Kaiser Aluminum & Chem. Sales, 17 BRBS 183, 187 (1985).

Most frequently, the effect of Section 8(f) is to limit the employer's liability to 104 weeks of compensation; thereafter, the Special Fund makes the compensation payments. Many cases have stated the requirements for Special Fund relief in some variation of the following language:

> To qualify for §§ 8(f) relief, an employer must make a three-part showing (i) that the

> employee had a pre-existing partial disability, (ii) that this partial disability was manifest to the employer, and (iii) that it rendered the second injury more serious than it otherwise would have been.

Director, OWCP v. Berkstresser, 921 F.2d 306, 309, 24 BRBS 69 (CRT) D.C. Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989).

The medical evidence undeniably presented that Claimant had a pre-existing condition, which was known to Employer, and aggravated by Claimant's July 13, 1995 workplace accident, as indicated by the testimony of treating physician Dr. Miranne and also by Dr. Applebaum. Accordingly, I find that Employer is entitled to Section 8(f) relief under the Act, thus limiting Employer's liability to 104 weeks of compensation as of Claimant's MMI date, May 9, 1997. Thereafter, the Special Fund will make the compensation payments.

## V. INTEREST AND ATTORNEY FEES

Although not specifically authorized in the Act, the Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., *aff'd in pertinent part and rev'd on other grounds, sub nom*, Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board has concluded that the rate used should be "the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)." Grant v. Portland Stevedoring Co., et al.,16 BRBS 267 (1984). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 28 of the Act and implementing Code of Federal Regulations Section 702.132 provides for approval of attorneys' fees. Claimant's counsel is hereby allowed thirty (30) days from the date of service of this decision to supplement his present application and submit the application for attorney's fees. A service sheet showing that service has been made on all parties, including Employer, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application

## ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and the record in its entirety, I

enter the following Order:

1. Employer shall Claimant compensation for temporary total disability pursuant to Section 8(b) of the Act for the period from July 13, 1995 to May 8, 1997, based on an average weekly wage of $995.38 with a corresponding compensation rate of $663.59.

2. Employer shall pay Claimant compensation for permanent total disability from May 9, 1997 and continuing for a total of 104 weeks, based on an average weekly wage of $995.38 with a corresponding compensation rate of $663.59, in accordance with the provisions of Section 8(a) of the Act.

3. Employer shall be entitled to Section 8(f) relief after 104 weeks of permanent total disability was paid, subsequent to Claimant's MMI date of May 9, 1997.

4. Employer shall be entitled to a credit for the net amount of benefits received by Claimant, factoring in the taxed amount, and said credit shall be calculated by the District Director.

5. Employer shall pay interest on any accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent, as determined by the Secretary of the Treasury, of the average auction price for the last auction of 52 week United States Treasury bills as of the date this Decision and Order is filed with the District Director.

6. Employer is liable for a 10 percent penalty under Section 14(e) of the Act for those compensation installments which were due and unpaid prior to Employer's filing of Notices of Controversion, and said penalty shall be calculated by the District Director.

7. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel, who shall have twenty (20) days to file any objection thereto.

**ORDERED** this 3rd day of August, 2000, at Metairie, Louisiana.

CLEMENT J. KENNINGTON
Administrative Law Judge